

SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, PETITIONER,

vs.

JOHN R. THOMPSON COMPANY, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR CERTIORARI FILED FEBRUARY 20, 1953

CERTIORARI GRANTED APRIL 6, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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JOINT APPENDIX

1

Filed Aug 1 11 34 AM '50

Information

Violation of

Violation Acts of Legislative Assembly

DISTRICT OF COLUMBIA

v.

JOHN R. THOMPSON COMPANY, INC., a body corporate, by and through its Vice-President, Sylvester Becker, the Superintendent of the Washington Division of said Corporation.

Witnesses: Mary Church Terrell, 1615 S Street, N. W., Joan J. Williams, 1751 N Street, N. W., Arthur F. Elmes, 116 Seaton Place, N. W. Aug 1 1950

The court of its own volition hereby quashes the information. Frank H. Myers (signed).

Col. No. 111019.

August 7, 1950. - Notice of Appeal filed. ALC
A true copy. Test: Walter F. Bramhall, Clerk, Municipal Court, D. C. By Pauline Anderson, Deputy Clerk.

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA,
CRIMINAL DIVISION

July Term, A. D. 1950.

THE DISTRICT OF COLUMBIA, ss:

VERNON E. WEST Esq., Corporation Counsel, by Clark F. King, Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that John R. Thompson Company, Inc., a body corporate, by and through its Vice-President, Sylvester Becker, the Superintendent of the Washington Division

of said Corporation, late of the District of Columbia aforesaid, on the 27th day of July in the year A. D. nineteen hundred and fifty, in the District of Columbia aforesaid, and on premises 725 14th Street, Northwest, being then and there the proprietor and keeper of a restaurant, did then and there refuse to sell an article, and thing, to wit, food and the service of food, kept for sale by it in said restaurant, to Mary Church Terrell, and Arthur F. Elmes who were well behaved and respectable persons of the Negro race, solely because of the race and color of the said Mary Church Terrell, and Arthur F. Elmes, contrary to and in violation of an Act of the Legislative Assembly of the District of Columbia in such case made and provided, and constituting a law of the District of Columbia.

Second Count: Vernon E. West, Esq., Corporation Counsel by Clark F. King, Assistant Corporation Counsel, who for the District of Columbia prosecute in this behalf in his proper person, comes here into Court, and causes the Court to be further informed, and complains that the said John R. Thompson Company, Inc., a body corporate, on the 27th day of July, A. D. 1950, at the location aforesaid being then and there a proprietor and keeper of a licensed restaurant did then and there refuse to sell an article and thing, to wit, food and the service of food, kept for sale by it, to Mary Church Terrell, Joan J. Williams, and Arthur F. Elmes who were well behaved and respectable persons, who desired the same, contrary to and in violation of an Act of the Legislative Assembly of the District of Columbia in such cases made and provided, and constituting a law of the District of Columbia.

Third Count: Vernon E. West, Esq., Corporation Counsel by Clark F. King, Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be further informed, and complains that the said John R. Thompson Company, Inc., a body corporate, on the 27th day of July, A. D. 1950, at the location aforesaid, being then and there the proprietor and keeper of a licensed restaurant, did then and there refuse to accommodate in said restaurant Mary Church Terrell, Joan J. Williams, and Arthur F. Elmes, who were well behaved and respectable persons, contrary to and in violation of an Act of the Legislative Assembly of the District of Columbia in such case made and provided, and constituting a law of the District of Columbia.

Fourth Count: Vernon E. West, Esq., Corporation Counsel by Clark F. King, Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be further informed, and complains that the said John R. Thompson Company, Inc., a body corporate, on the 27th day July, A. D. 1950, at the location aforesaid, being then and there the proprietor and keeper of a licensed restaurant did then and there fail, decline, object and refuse to treat Mary Church Terrell, Joan J. Williams, and Arthur F. Elmes, who were well behaved and respectable persons, as other well behaved and respectable persons were treated by said John R. Thompson Company, Inc., at said restaurant, contrary to and in violation of an Act of the Legislative Assembly of the District of Columbia in such case made and provided, and constituting a law of the District of Columbia.

VERNON E. WEST,
Corporation Counsel.

Personally appeared Margaret A. Haywood this 1st day of August A. D. 1950, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

(signed) CLARK F. KING,
*Assistant Corporation Counsel in
and for the District of Columbia.*

3 IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division
Criminal No. 111019
DISTRICT OF COLUMBIA

V.
JOHN R. THOMPSON COMPANY, INC., a corporation

Order Quashing Information

This matter having come on for hearing upon an information charging the defendant corporation with violations of certain sections of certain acts passed by the Legislative

Assembly for the District of Columbia in 1872 and 1873, and it appearing to this Court that the information in question is fatally defective in that the government seeks to prosecute the defendant corporation under certain Acts which this Court on July 11, 1950, in Criminal Cause No. 99,150, against the same defendant held to have been repealed by implication through the enactment of the Organic Act of 1878 by the Congress of the United States, and it further appearing to this Court that an arraignment of the defendant corporation is unnecessary at this time, although counsel for defendant corporation voluntarily was present in court but did not formally enter his appearance herein, it is, by the Court, this 1st day of August, 1950,

ORDERED, That the information herein be, and the same hereby is, quashed.

(signed) FRANK H. MYERS
Judge

4 IN THE MUNICIPAL COURT FOR THE DISTRICT OF
COLUMBIA

Civil Division

Criminal No. 9150

DISTRICT OF COLUMBIA

v.

JOHN R. THOMPSON COMPANY, INC., A Body Corporate

Opinion of the Court

The information in the above entitled criminal proceedings charges the defendant, John R. Thompson Company, a corporation, acting through its duly authorized employee or agent, with violations of certain sections of certain acts passed by the Legislative Assembly for the District of Columbia in 1872 and 1873, in that on February 28, 1950, the said defendant did then and there refuse to sell food and

the service of food or to otherwise accommodate certain "well-behaved and respectable" members of the Negro race in its restaurant at 725 14th Street, N. W., this city, solely because of the race and color of said persons.

In attacking the validity of the information, defendant sets forth a number of defenses: (1) That the Acts of the Legislative Assembly were unconstitutional and invalid because beyond the power of the Congress of the United States to delegate to the Legislative Assembly; (2) That the Acts of 1872 and 1873 were invalid because unreasonable; (3) That both Acts by long disuse are obsolete and unenforceable; (4) That both Acts, if ever valid, have been repealed; (5) That both Acts were repealed by the Alcoholic Beverage Control Act of the District of Columbia; and (6) That both Acts were expressly repealed by the D. C. Code of 1901, and not saved by any of the exceptions therein.

An Agreed Statement of Facts has been prepared and submitted to the Court by counsel for the municipal government and for the defendant corporation and substantially shows as follows:

John R. Thompson Company is a corporation doing business in the District of Columbia and operates a duly licensed restaurant at the premises numbered 725 14th Street, N. W. On February 28, 1950, while said restaurant was open for business, three persons of the Negro race, Mary Church Terrell, Essie Thompson, and Arthur F. Elmer, well-behaved and respectable persons, entered said restaurant and requested to be served. They were informed by defendant's local manager that it was not the policy of the restaurant to serve members of the Negro race and he refused to sell to or otherwise accommodate the three aforesaid persons, or any of them, solely because of their race and color.

The information against the defendant is in four counts and it has been stipulated that the First Count is based upon certain sections of the Legislative Assembly Act of June 20, 1872, and the remaining three counts are based upon

certain sections of the Legislative Assembly Act of June 26, 1873.

The pertinent portions of these acts which have allegedly been violated provide:

“That any restaurant keeper or proprietor, any hotel keeper, proprietor, proprietors or keepers of ice cream saloons or places where soda water is kept for sale, or keepers of barber shops and bathing houses, *refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude*, or any restaurant, hotel, ice cream saloon or soda fountain, barber shop or bathing house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, at the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor * * *

(Section 3, Act of 1872) and “That the proprietor or proprietors, keeper or keepers of any licensed restaurant, eating house, barroom, sample room, ice cream saloon, or soda fountain room *shall sell at and for the usual or common prices charged by him, her or them* * * *

any article or thing kept for sale by him, her or them *to any well-behaved and respectable person or persons* who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment” and

“That the proprietor or proprietors, or keeper or keepers of every licensed restaurant, eating house, barroom,

6 sample room, ice cream saloon, or soda fountain room, or establishment in the District of Columbia

* * * *(who) shall refuse or neglect, in person or by his, her, or their employee or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating house, barroom, sample room, ice cream saloon, or soda fountain room, or shall refuse or neglect to sell at the common and*

usual prices aforesaid in and at his, her or their restaurant, eating house, barroom, sample room, ice cream saloon, or soda fountain room, to any such person or persons therein at said prices * * *, or, under any circumstances or for any reason, cause or pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating house, barroom, sample room, ice cream saloon, or soda fountain room, he, she, or they, on conviction of a disregard or violation * * * (Sections 3 and 4, Act of 1873) * * * be fined one hundred dollars, and forfeit his, her, or their license (for one year)."

The Court notes that Section 1 of the 1872 Act further provides that keepers or owners of restaurants, eating houses, etc. "must put in their restaurant * * * a scale of the prices for which the different articles they have for sale will be furnished" under penalty upon conviction of a fine of not less than \$20.00 and not more than \$50.00; and that Section 1 of the 1873 Act provides that the proprietor or proprietors of every licensed restaurant, eating house, etc. "shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms * * * and in one conspicuous place in each small or private room * * * printed cards or papers on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof * * *" and Section 2 of the same Act provided that "on or before the first day of November in each year the proprietor or proprietors * * * shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale * * * and in a failure * * * to transmit the copy aforesaid, the

7 Register shall notify such person of such failure, and require such copy to be forthwith transmitted to

him" under the same penalty as provided for the failure to serve or accommodate any well-behaved and respectable person or persons in the restaurant or eating place. The Agreed Statement of Facts further discloses that the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the "Assessor" for the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale and, so far as is known, no demands were ever made upon local restaurants so to file by the "Assessor" or other municipal officer. In spite of continuing violations of these sections of both acts which the District of Columbia now claims to be in full force and effect, no action to this date has been taken to charge and prosecute the defendant for its failure to comply with the same.

The Court permitted a number of briefs to be filed by individuals and by groups as *Amici Curiae* in view of their interest in the subject matter of the prosecution. Briefs were also filed by the Assistant Corporation Counsel and by defendant's counsel. All such briefs have been duly read and considered by the Court in reaching its final decision in this case.

In view of the apparent misunderstanding on the part of many interested persons as to the question of law which is presented in these proceedings, the Court desires to clearly state that question at this point: There is no dispute as to the facts. They are admitted by both sides. The sole question of law is—

Were the Legislative Assembly Acts of June 20, 1872 and of June 26, 1873, validly enacted and were these Acts in full force and effect on February 28, 1950, when the alleged violations occurred?

8 An Act of Congress of February 21, 1871 (16 Stat. 419, Ch. 62) replaced a pre-existing "mayoralty" form of government in the District of Columbia with a "territorial" form of government. Section 5 of the Act provided that the legislative power and authority be vested

in a legislative assembly which consisted of the Council and the House of Delegates. Section 18 of the Act recited the legislative authority:

"* * * that the legislative authority of the District shall extend to all rightful subjects of legislation within the said District, consistent with the Constitution of the United States and the provisions of this Act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the Tenth Section of the First Article of the Constitution of the United States; but all acts of the Legislative Assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein to be construed to deprive Congress of the power or legislation over said District in as ample manner as if this law had not been enacted."

The Legislative Assembly was short-lived. The Temporary Organic Act of June 20, 1874 (18 Stat. 116) abolished it and provided for an interim form of Commission government for the District with separate school and police boards, while a special Congressional Committee formulated a blueprint of a permanent form of government to be approved by Congress. The Organic Act of June 11, 1878, (20 Stat. 102) established such permanent form of government. The enacting clause provided—"Said District and the property and persons that may be therein shall be subject to the following provisions for the government of the same, and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this Act. * * * and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this Act shall remain in full force and effect."

In 1901 the Congress passed the Code of Laws for this District (31 Stat. 1189, Act of March 3, 1901) in which Section I provided that "the common law, all British statutes in force in Maryland on February 27, 1801; the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all

9 acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except insofar as the same are inconsistent with, or replaced by, some provisions of this code." Section 1636 of the 1901 Code states that "all acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia; and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed *except*" (eleven exceptions are set forth of which only two appear relevant to this case)—(3rd) "Acts and parts of acts relating to the organization of the District government, * * * or to police regulations and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations" and (5th) "All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." Thereafter two other Codes were compiled, one in 1929 and one in 1940, by neither received the official approval of Congress. It is to be noted that in publishing the 1901, 1929 and 1940 Codes, the Acts of 1872 and 1873 as enacted by the Legislative Assembly were never included. The above would seem to be a fair review of the history relating to the enactment of law for the District of Columbia with relation to the principal question before this Court.

Preliminary to reaching its conclusion on the main issue the Court is of the opinion that—

- (1) The Legislative Assembly for the District of Columbia did have the right to enact the two Acts of 1872 and 1873 because they were in the nature of municipal ordinances or police regulations.¹

¹ *Crowley v. Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620; *Stoutenburg v. Hennick*, 129 U. S. 141, 9 S. Ct. 256, 32 L. Ed. 637; *McQuillin-Municipal Corporations*; 1943 Ed.) Vol. 3, Sec. 949, pages 111-112; *Southwestern Tel-*

(2) The Legislative Assembly Acts in their objective light were not unreasonable.²

Certain other points were raised by the defendant in opposition to the present proceedings. Such points were denied by the government. The Court does not deem it necessary to pass upon all issues in this case in order to determine the principal question. Therefore, unless each issue has been specifically resolved in this opinion, the Court has not and does not decide the same. The only question that remains to be determined at this point is whether or not the Acts of 1872 and 1873 were in anywise repealed.

The Court has reached the conclusion that these old acts of the short-lived legislative assembly have been repealed. The basis for this conclusion is to be found in a consideration of the Organic Act of 1878 which first established a complete and permanent form of government for the District of Columbia and of the subsequent execution thereunder of the wide authority vested in the Commissioners through their promulgation of many municipal ordinances dealing with the ownership, control, maintenance and operation of establishments dispensing food and drink in the District.

The 1878 Act was passed for the express purpose of providing a complete form of permanent government for the District of Columbia and for legislative substitution for all previous legislation enacted dealing with the same sub-

phone & Telegraph Co. v. City of Houston, 256 F. 690; *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1949; *Porcell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 32 L. Ed. 253; *Southern Railway Co. v. Inman*, *Ackers & Inman*, 11 Ga. App. 567, 75 S. E. 908; *Roach v. Van Riperick*, *MacArthur & Mackay*, 171 D. C. 1879; *Stone v. Mississippi*, 101 Miss. 814 (aff. 101 U. S. 814, 25 L. Ed. 1079); *Pickett v. Kuchan*, 323 Ill. 138, 140; *Railway Mail Assn. v. Corsi*, 65 S. Ct. 4483, 326 U. S. 88, 89 L. Ed. 2072; *Messenger v. State*, *Darius v. Apostolos*, 68 Colo. 323; *Western Turf Assn. v. Greenburg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 20; *People of the State of New York v. King*, 119 N. Y. 418; *Balden v. Grand Rapids Operating Co.*, 239 Mich. 318.

² *Mugler v. Kansas*, *supra*; *Yick Wo v. Hopkins*, 118 U. S. 353, 6 S. Ct. 1064, 30 L. Ed. 220; *Crowley v. Christensen*, *supra*; *Cooper v. D. C.*, (*MacArthur & Mackay*, D. C. 1880, p. 250).

ject matter. It seems inescapable that, if this premise be correct, then the Acts of 1872 and 1873 as such, although not directly repealed, have both been repealed by implication.

It is true that repeal by implication is not favored, but it is well settled law that this mode of repeal is just as effective as express repeal, where the later enactment covers the whole subject matter of the previous law and is plainly intended to prescribe the only rule which shall govern. This would seem to be the case in respect to the municipal ordinances governing the operation and maintenance of eating places in the District of Columbia.

Section Two of the Act of 1878 provided that "the new government shall exercise all the powers and authority now vested in the Commissioners of said District except as hereinafter limited or provided and shall be subject to all restrictions and limitations and duties which are now imposed upon said Commissioners." Section Six provided that "the Board of Metropolitan Police and the Board of School Trustees shall be abolished and all the powers and duties now exercised by them shall be transferred to the said Commissioners of the District of Columbia who shall have authority * * * to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this Act."

Under this authority, the Commissioner did promulgate regulations governing the control and operation of restaurants and eating places.³

12 There is authority to the effect that the Organic Act of 1878 did not repeal all acts of the Legislative Assembly.⁴ In the case of *Johnson v. District of Columbia*,

³ License Act of July 1, 1902; later repealed by the License Act of July 2, 1932 (47 Stat. 551); Act of February 26, 1892 (27 Stat. 394); D. C. Code 1940.

⁴ *Cooper v. D. C.* (MacArthur & Mackay, p. 250, D. C. 1880) (Produce Dealers' licenses); *D. C. v. Waggaman*, 4 Mackay 328, (1885) (Real Estate Agents' Tax); *Costello v. Palmer*, 20 App. D. C. 210 (1902) (Conveyance away of property during pendency of a suit involving the debt.) Distinguished from: *U. S. v. May*, 2 MacArthur, 512 (D. C. 1876) (Prosecution for abortion which was allowed two years before Act of 1878); *Hutchins v. Hutchins*, 48 App. D. C. 286 (1919) (Costs allowed for unsuccessful defense of a will under Maryland Act of 1798).

30 App. D. C. 520 (1908), the defendant was convicted for mistreating his horse in violation of a "cruelty to animals" act approved by the Legislative Assembly on August 23, 1871. It should be noted that in this case the defendant contended (1) that the statute was not the exercise of a municipal power but an act of general legislation and (2) that the act had been repealed by Section 1636 of the 1901 Code. The Court rejected both contentions. In the present case, this Court agrees with the Johnson decision in respect to its holding that the acts of the Legislative Assembly were municipal ordinances and, therefore, validly enacted. On the other hand, this Court has reached the conclusion that the Organic Act of 1878 by implication repealed the earlier acts of the Legislative Assembly and, therefore, they do not fall within the saving clauses of Section 1636 of the 1901 Code. It should also be pointed out that a further difference between the Johnson case and the present one is found in the language of the former decision at page 522:

"That Congress deemed the act within the scope of the powers delegated to the municipality is evidenced by the Act of February 13, 1885 (23 Stat. 302) which provided that thereafter the 'Association for the Prevention of Cruelty to Animals for the District of Columbia' should be known as the 'Washington Humane Society,' and should 'be authorized to extend its operations * * * to the protection of children as well as animals from cruelty and abuse.' * * * "

It could be fairly argued that in the light of this language, the 1885 statute was in reality a re-enactment of the act of the Legislative Assembly under which the information against the defendant was brought. In any event, the unappealed decision of the Johnson case is not persuasive in the present proceedings when compared with the much stronger language of the Supreme Court in two prior cases.

This Court is impelled to the present conclusion of repeal by implication by its consideration of the opinions of the United State Supreme Court in two cases decided in 1890 and 1891 respectively which dealt directly with the Act of 1878.

Eckloff v. District of Columbia (1886), 4 Mackay 672

This case held that a plaintiff had no valid cause of action for back pay under an 1861 statute because the Organic Act of 1878 had repealed the earlier statute. The lower court, in tracing the legislative history of the District, said:

"* * * Finally in 1878, Congress passed a law, intended, as we think, to establish a complete system of government for this District, concentrating in three Commissioners such powers and duties as had, until that time, been independent of them. This Act, we conceive, is to be regarded as an organic act, intended to dispose of the whole question of a government for this District, and the powers bestowed by it upon the Commissioners are to be regarded as organic powers. In other words, we must address ourselves to the work of construing it much as we should to the construction of what are called constitutional powers. If this be the true nature of this statute, a general power given to the possessors and executives of all the powers of government provided for the District, must be intended to be complete and comprehensive, and is not to be cut down by referring to antecedent statutes which had made special provisions for a part of the government of the District.
* * *"

"* * * We conceive that this is the true character of the complete organization provided by the Act of 1878 for the Government of the District, and that, when so regarded, it must be held to do away with the impediments which pre-existing acts on special subjects would place in the way of the organic power over the whole subject of offices."

In affirming the lower court, the Supreme Court said:

(135 U. S. 240, 10 S. Ct. 752, 34 L. Ed 120 (1890))

“When to a board having general administrative supervision of the affairs of a community, and with plenary power in the matter of appointment and removal of subordinates, is added the control of another department, and no express words of limitation are found in the act making the transfer, it is to be presumed that such board has the same plenary power in respect to this new department and is not hampered by limitations attached to the board which theretofore had control of it. The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject matter of the legislation.

“But our conclusions are not controlled by this construction alone. The court below placed its decision on what we conceive to be the true significance of the Act of 1878. As said by that court, it is to be regarded as an organic act, intended to dispose of the whole question of a government for this District. It is, as it were, a constitution for the District. It is declared by its title to be an act to provide, ‘a permanent form of government for the District’. The word ‘permanent’ is suggestive. It implies that prior systems have been temporary and provisional. As permanent, it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation, to be made to fit into the provisions of the prior legislation, but it is a single, complete act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain. It is the constitution of the District, and its grants of powers are to be taken as new and independent grants, and expressing in themselves both their extent and limitations.”

In another case before the United States Supreme Court in 1891, *District of Columbia v. Hutton*, 143 U. S. 18, 12

S. Ct. 369, 36 L. Ed. 60, the Court, in dealing with certain back pay which the plaintiff claimed under Section 354 of the Revised Statutes, said:

" * * * we think the Court below was correct in holding that the Act (of 1878) superseded and repealed by implication Section 354 of the Revised Statutes relating to the District of Columbia. It is true that there are no express words of repeal in the Act of 1878 applied to said Section 354. But the whole tenor of the Act shows that it was intended to supersede previous laws relating to the same subject matter and to provide a system of government complete in itself in all respects."

If there were no acts or parts of acts of the Legislative Assembly in force and effect on the date of the passage of the 1901 Act, then the saving clauses of Section 1636 of that Act are no more than a nullity as affecting these acts. It is, therefore, unnecessary for this Court to consider this phase of the matter as it has already held as a matter of law that the Acts of 1872 and 1873 of the legislative Assembly did not survive the Organic Act of 1878 because the latter repealed them by implication.⁵

The Court recognizes that it is a real problem in the District of Columbia for members of the Negro race, who meet the requirement in every way for good behavior and respectability, to find adequate and satisfactory places in many sections of this city when they may obtain and be served with food and drink. However, in the opinion of the Court, the solution of this particular problem does not lie in an attempted revival and enforcement of parts of old municipal regulations enacted in 1872 and 1873 which the Court has found as a matter of law to have been superseded by the Organic Act of 1878.

⁵ See also *Callan v. D. C.*, 16 D. C. App. 271; *Roth v. D. C.*, 16 D. C. App. 323, 333; *Bride v. Macfarland*, 18 D. C. App. 120; *U. S. v. Tynen*, 78 U. S. 88, 92, 20 L. Ed. 153; *Tracy v. Tuffy*, 434 U. S. 206; *Fisk v. Henarie*, 142 U. S. 459.

Accordingly, as of July 11, 1950, an entry will be made dismissing the present information and discharging the defendant.

(sgd.) FRANK H. MYERS,
Trial Judge.

July 10, 1950

copies mailed to:

Asst. Corp. Counsel KANG

RINGGOLD HART, Esq.

Attorney for Defendant

16 IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

January Term, 1950

Information No. 99150

DISTRICT OF COLUMBIA

v.

JOHN R. THOMPSON Co., Inc.

Agreed Statement of Facts

Counsel for the District of Columbia and counsel for the defendant agree that the following are the facts in the above entitled case.

That John R. Thompson Company is a corporation doing business in the District of Columbia; that it is the owner and proprietor of a restaurant known as and numbered 725 14th Street, N.W., Washington, D. C.; that it holds a District of Columbia license for the conduct of such restaurant and held such license on February 28, 1950; that Sylvester Becker is Vice-President and Superintendent of the Washington Division of the John R. Thompson Company, Inc. and the local Manager of the aforesaid restaurant.

That on the 28th day of February, 1950, while said restaurant was open for business, three persons of the Negro

race, Mary Church Terrell, Essie Thompson and Arthur F. Elmer, all agreed to be well-behaved and respectable persons, entered said restaurant and requested to be served; that the defendant, through its local manager, informed each of the three persons aforesaid that it was not the policy of the restaurant to serve to members of the colored race, and defendant then and there refused to sell or otherwise accommodate the three aforesaid persons, or either of them, solely because of their race and color.

And it is further agreed:

17 There is no official record of any attempted prosecutions for violations of the terms of the Legislative Assembly Act of June 20, 1872; that upon information and belief there were four such prosecutions, all resulting in convictions in the Police Court but all being reversed in the Supreme Court of the District of Columbia, holding criminal court, or resulted in *nolle pross*; that all four such prosecutions were in the year 1872 and that there have been no further attempted prosecutions under the 1872 Act since that year.

That there is no official record of any attempted prosecutions under the terms of the Legislative Act of June 26, 1873, and, so far as can be learned, there was never an attempt of prosecution under that Act.

And it is further agreed:

That the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the Assessor of the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale, as required by the Act of June 26, 1873, and, so far as is known, no demands were ever made upon local restaurants so to file by the Assessor or other municipal officer.

And it is further agreed:

That the first count of the declaration is based upon the Legislative Assembly Act of June 20, 1872 and the second,

third, and fourth counts are based upon the Legislative Assembly Act of June 26, 1873.

(sgd.) CLARK F. KING
*Assistant Corporation Counsel
for the District of Columbia*

(sgd.) RINGGOLD HART
Attorney for Defendant

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THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal No. 111019

DISTRICT OF COLUMBIA

v.

JOHN R. THOMPSON COMPANY, INC., a corporation

Notice of Appeal

Name and address of appellant: District of Columbia, a municipal corporation, District Building, Washington, D. C.

Name and address of appellant's attorneys: Vernon E. West, Corporation Counsel, D. C., Chester H. Gray, Principal Assistant Corporation Counsel, D. C., Clark F. King, Assistant Corporation Counsel, D. C., District Building, Washington, D. C.

Offense: Violation of Acts of the Legislative Assembly, 1872 and 1873.

Date of Judgment: August 1, 1950.

Brief description of judgment: Order quashing information.

The above named appellant hereby appeals to the Municipal Court of Appeals for the District of Columbia from the judgment above mentioned.

/s/ VERNON E. WEST
Corporation Counsel, D. C.

/s/ CHESTER H. GRAY
*Principal Assistant Corpora-
tion Counsel, D. C.*

/s/ CLARK F. KING
*Assistant Corporation Coun-
sel, D. C.,
Attorneys for Appellant*

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THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

Criminal No. 111019

DISTRICT OF COLUMBIA

v.

JOHN R. THOMPSON, INC., a corporation

Statement of Errors

The Court erred in holding that the Act of the Legislative Assembly of 1872 and 1873 were repealed by implication.

/s/ VERNON E. WEST C.H.G.
Corporation Counsel, D. C.

/s/ CHESTER H. GRAY
Principal Assistant Corporation Counsel, D. C.

/s/ CLARK F. KING
Assistant Corporation Counsel, D. C.

Attorneys for Appellant

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Filed Aug 15 12 43 PM '50

THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

Criminal No. 111019

DISTRICT OF COLUMBIA

v.

JOHN R. THOMPSON COMPANY, INC., a corporation

Statement of Proceedings and Evidence

The above entitled cause came on for hearing on August 1, 1950, and was called in open Court. The defendant did not answer. The Court, sua sponte, then and there ordered the information quashed for the reasons stated in said order, and in conformity with its previous opinion dated July 10, 1950 in Criminal No. 99150 against the same defendant.

(signed) FRANK H. MYERS

Judge

September 7, 1950

/s/ VERNON E. WEST

Corporation Counsel, D. C.

/s/ CHESTER H. GRAY

Principal Assistant Corporation
Counsel, D. C.

/s/ CLARK F. KING

Assistant Corporation Counsel, D. C.
Attorneys for Appellant

Minute Entry

Wednesday, February 28, 1951

The Court met pursuant to adjournment. Present: The Honorable Nathan Cayton, Chief Judge, Andrew M. Hood and Brice Clagett, Associate Judges.

Proclamation being made, the Court is opened.

No. 967

DISTRICT OF COLUMBIA, *Appellant*,

v.

JOHN R. THOMPSON COMPANY, INC., *Appellee*.

The argument in the above entitled case was commenced by Mr. Chester H. Gray, attorney for appellant, was continued by Mr. Ringgold Hart, attorney for appellee, and was concluded by Mr. Chester H. Gray, attorney for appellant.

THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 967

DISTRICT OF COLUMBIA, APPELLANT,

v.

JOHN R. THOMPSON COMPANY, INC.,
a body corporate, APPELLEE.

Appeal from The Municipal Court for the
District of Columbia,
Criminal Division

Argued February 28, 1951,

Decided May 24, 1951

Chester H. Gray, Principal Assistant Corporation Counsel, with whom *Vernon E. West*, Corporation Counsel, and *Edward A. Beard*, Assistant Corporation Counsel, were on the brief, for appellant.

Ringgold Hart, with whom *John J. Wilson* and *Jo V. Morgan, Jr.*, were on the brief, for appellee.

With leave of court the following filed briefs as *amici curiae*:

Phineas Indritz for the Greater Washington Area Council of the American Veterans Committee, Inc.

Harry C. Lambertson, *James A. Cobb* and *Joseph Forer* for the District of Columbia Chapter, National Lawyers Guild.

Sanford H. Bolz, *Stanley B. Frosh*, *William C. Koplovitz* and *Phineas Indritz* for the American Council on Human Rights, et al.

Eoster Wood for the Washington Chapter, Unitarian Fellowship for Social Justice, and The Washington Friends Joint Social Order Committee.

Leroy H. McKinney for The Washington Bar Association, Inc.

David Rein for the Coordinating Committee for the Enforcement of the D. C. Anti-Discrimination Laws.

Margaret A. Haywood on behalf of a group of twelve citizens of the District of Columbia.

Before CAYTON, Chief Judge, and HOOD and CLAGETT, Associate Judges.

CAYTON, *Chief Judge*: The District of Columbia appeals from an order of the Municipal Court quashing an information which charged that defendant John R. Thompson Company, Inc., a restaurant operator, had in violation of law refused to serve prospective patrons because they were of the Negro race.

The information stated the charge in four separate counts and the matter was presented to the trial court on an agreed statement of facts from which it appears that three persons of the Negro race, who concededly were "well-behaved and respectable persons," entered defendant's restaurant and asked to be served, but were told by defendant's local manager "that it was not the policy of the restaurant to serve members of the Negro race." Defendant then and there refused to sell or otherwise accommodate the three aforesaid persons, or any of them, solely because of race and color. This the government charged was in violation of two Acts of the Legislative Assembly for the District of Columbia passed respectively in 1872 and 1873:

In a written memorandum,¹ the trial judge ruled that the Acts of the Assembly were valid and "in their objective light were not unreasonable," but he also ruled that the Acts had been repealed by implication and proceeded to dismiss or "quash" the information. Thus the case comes here for review on appeal by the District of Columbia. In addition to the briefs of appellant and appellee, there have been filed with our permission several briefs of *amici curiae* as indicated in the caption.

The government assigns as error the ruling that the Acts of the Legislative Assembly had been repealed by implication. Appellee contends not only that the Acts are no longer in force, but that they were void *ab-initio*.

¹ The memorandum was actually filed in an earlier case brought against the same defendant, Municipal Court Criminal Case No. 99150, involving the same offense, but it was adopted by the same judge who wrote it as the basis for his decision herein.

The Legislative Background.

By Act of the Congress of the United States passed on February 21, 1871, a government was set up for the District of Columbia. 16 Stat. 419. Section 5 of the Act vested legislative power in a Legislative Assembly, specifying certain conditions and reserving to the Federal Congress certain enumerated legislative powers and also supervisory control over the Legislative Assembly. In one section (18) it was separately provided "That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

Acting under the Congressional authority just recited, the Legislative Assembly on June 20, 1872 enacted the following:

"And be it further enacted, That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and the the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or

soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture." Ch. LI, Sec. 3.

A year later, on June 26, 1873, the succeeding Assembly enacted much lengthier sections dealing with the conduct of restaurants, eating houses, and similar establishments, and again made it a violation of law to refuse to serve "any well-behaved and respectable person or persons who may desire the same" or to discriminate against any such person in any one of several ways.

The Validity of the Acts.

We must first consider the contention of defendant restaurant keeper that the Acts were void. The first contention is that these were not mere regulations but Acts of general legislation and therefore beyond the power of the Assembly to enact. The trial court ruled otherwise, and I think correctly. I think that Congress clearly had the power under the Federal Constitution to delegate to the local Assembly the right to promulgate regulations of this type. I also think that a municipality has the right in the exercise of its general police power to regulate the conduct of public eating places for the protection of the public health, safety and order. Further, I think that in passing the Acts here in question the Assembly was not creating new rights, as the defendant contends, but was merely, by local regulation, defining and assuring the observance of existing rights of citizens within the local jurisdiction. Decisions of the Supreme Court and of the local appellate courts support this view. *Stoutenburgh v. Hennick*, 129 U.S. 141, relied on by both parties, invalidated an Act of the Assembly on the premise that by imposing licensing restrictions on commercial agents doing business outside the District it constituted a regulation of interstate commerce which could not properly be interfered with by local government. But the court recognized that "local affairs shall be managed by local authorities," and that though the power to make some laws cannot be delegated, "the creation of municipal-

ities exercising local self-government has never been held to trench upon that rule."

The Supreme Court of the District of Columbia² in *Roach v. Van Riwick*, MacArthur & Mackey (11 D.C.) 171, held invalid an Act of the Assembly which made court judgments operate as liens on equitable interests in land, the court ruling that this was general legislation and hence in the sole province of Congress. "We cannot doubt, however," said the court, "that Congress intended to confer on the District government the fullest legislative power with certain express restrictions. Their power is declared to extend to all rightful subjects of legislation consistent with the Constitution and the provisions of the organic act, and subject to the restrictions and limitations imposed upon the States by the 10th section of the first article of the Constitution." The court also recognized that "the regulation of local concerns in a town, is considered as properly belonging to its inhabitants . . . and it is hardly looked upon as a delegation of legislative authority."

A few months later the same court in *Cooper v. The District of Columbia*, MacArthur & Mackey (11 D.C.) 250, 251, referring to the *Roach* case, said, "All that was decided there was that Congress had no right to bestow upon the legislative assembly of the District any powers which were not necessary for it as a municipality; but the decision expressly, in more than one place, declares that whatever was granted by Congress to the legislative assembly of the District, in respect to matters properly pertaining to municipal government, was a valid grant."

Another case relied on by appellee is *Smith v. Olcott*, 19 App. D.C. 61. There the Court of Appeals of the District of Columbia, created in 1893,³ held invalid a section of a licensing statute prescribing maximum charges which could be made by auctioneers on the ground that it set forth "one absolute, invariable charge for all sales of real estate." The decision added nothing to what had already been said in the *Stoutenburgh* case.

The most recent case applicable to the subject matter is *Johnson v. District of Columbia*, 30 App. D.C. 520, decided in 1908, in which the court refused to declare invalid an

² Now the United States District Court for the District of Columbia.

³ Now the United States Court of Appeals for the District of Columbia Circuit.

1871 Act of the Legislative Assembly prohibiting cruelty to animals. The court held the Act to be a mere police regulation and hence within the scope of powers delegated by Congress to the municipality, citing *Stoutenburgh v. Hennick*, 129 U.S. 141, and *Smith v. Olcott*, 19 App. D.C. 61. "Cruel treatment of helpless animals," said the court, "at once arouses the sympathy and indignation of every person possessed of human instincts,—sympathy for the helpless creature abused, and indignation towards the perpetrator of the act; and in a city, where such treatment would be witnessed by many, legislation like that in question is in the interest of peace and order and conduces to the morals and general welfare of the community." I shall not labor the obvious analogy between that enactment and the ones now before us. I think the interest of good government, public peace and order, morals and the general welfare of the community require the courts to hold that this was a reasonable and proper exercise of the police power. I think we may take it as true that these Acts were in furtherance of the purposes of the 13th and 14th Amendments to the Constitution and that they were in the spirit of the Civil Rights Acts of that era. But it by no means follows that the label of "general legislation" must be affixed to them. In purpose and scope they were merely local and regulatory and under the several decisions above-referred to were properly delegable by Congress to the local Assembly.

Another argument made by defendant is that the Acts interfere with its freedom of contract. But as Chief Justice Hughes said in *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 392, "freedom of contract is a qualified and not an absolute right."⁴ Thus the test is whether there was such interference as to be *unreasonable in law*. See *Western Turf Association v. Greenberg*, 204 U.S. 359. I think we cannot say that there was.

Nor can I approve defendant's contention that the Acts are discriminatory because barrooms were not included in the first Act nor hotels in the second. Defendant does not operate either a barroom or a hotel and hence cannot be heard to complain of the alleged discrimination. As the

⁴ To the same effect is *Radice v. People of the State of New York*, 264 U.S. 202.

government points out in its reply brief, one who attacks a statute as unconstitutional must show that he is within the class of persons as to whom it is unconstitutional and that he is injured thereby. If he is not hurt he cannot complain. *Heald v. District of Columbia*, 259 U.S. 114; *Tier v. Judges of the Court of Registration*, 179 U.S. 405; *Hendrick v. Maryland*, 235 U.S. 610; *Sprout v. City of South Bend, Indiana*, 277 U.S. 165; *Actna Ins. Co. v. Hyde*, 275 U.S. 440; *Corporation Commission of Oklahoma v. Lowe*, 281 U.S. 431; *Shearer v. Burnet*, 285 U.S. 228; *Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528. The same rule applies against one attacking a municipal ordinance. 62 C.J.S., Municipal Corporations, Sec. 433. Moreover, the two Acts are cumulative in nature and operation and should be read together.

As to defendant's contention that the Acts are unreasonable, I note that *District of Columbia v. Waggaman*, 4 Mackey (15 D.C.) 328, held that when there is an express legislative grant of power, courts have nothing to do with the reasonableness of an ordinance enacted under it, but can only construe the extent of the grant.

The Acts are also attacked on the ground that they provide for the forfeiture of licenses. But the object of these Acts is not the collection of a fine or the revocation of a license. See *District of Columbia v. Brooke*, 29 App. D.C. 563. These are merely the enforcement features of the Acts.

Nor is there merit in defendant's contention that the Acts must fail because the Municipal Court was given no power to forfeit licenses. The short answer is that such power need not and does not rest in the court but in the District of Columbia Commissioners who issued the license in the first place. And there are many instances in which the Commissioners have the power to revoke licenses as a result of court judgments⁵ or independently of court action.⁶

⁵ E.g., revocation of automobile operator's permit on conviction of operating under the influence of intoxicating liquor, Code 1940, 40-609(h); revocation of operator's permit for failure to satisfy judgment arising from collision, Code 1940, 40-403; revocation of money lender's license for conviction of violating Loan Shark Law, Code 1940, 26-606.

⁶ Code 1940 §§ 1-232; 2-1405, 2-1505, 47-2303, 47-2345.

I am clear in my view that the Acts under consideration were valid and became the subsisting and binding law of this jurisdiction.

Are the Acts presently enforceable?

The Municipal Court, as we have seen, ruled that the Acts were valid when enacted, but have since been repealed "by implication." Defendant-appellee also advances the argument that they have been expressly repealed.

It must be kept clearly in mind that Congress has consistently recognized the validity and binding force of Acts of the Legislative Assembly, though in some instances it disapproved certain enactments by expressly repealing or amending them. For example, in 1887 Congress expressly repealed parts of two Acts of the Assembly relating to license taxes on real estate agents and provided for a new tax (24 Stat. 368), and in 1891 expressly amended a provision of an Act relating to license taxes on second-hand dealers (26 Stat. 841).

Just as the courts have always recognized the express repeal of an Act of a Legislative Assembly,⁷ they have also recognized that Acts and parts of Acts of the Assembly which had not been expressly disapproved by Congress retained the status of valid legislation. *Cooper v. The District of Columbia*, MacArthur & Mackey (11 D.C.) 250 (1880); *District of Columbia v. Waggaman*, 4 Mackey (15 D.C.) 328 (1885); *District of Columbia v. Burgdorf*, 6 App. D.C. 465 (1895); *District of Columbia v. Weaver*, 6 App. D.C. 482 (1895); *Parsons v. The District of Columbia*, 8 App. D.C. 391 (1896); *Lasley v. The District of Columbia*, 14 App. D.C. 407 (1899); *Johnson v. District of Columbia*, 30 App. D.C. 520 (1908).

In reaching the conclusion that the Acts had been repealed by implication, the trial judge said:

"... The basis for this conclusion is to be found in a consideration of the Organic Act of 1878 which first established a complete and permanent form of government for the District of Columbia and of

⁷ In *Lansburgh v. The District of Columbia*, 11 App. D. C. 512, the court recognized that the Assembly's Act defining and authorizing "gift enterprises" under prescribed tax rates had been changed by Congress into a prohibition of the same defined activity, and sustained a conviction under the new statute.

the subsequent execution thereunder of the wide authority vested in the Commissioners through their promulgation of many municipal ordinances dealing with the ownership, control, maintenance and operation of establishments dispensing food and drink in the District.

"The 1878 Act was passed for the express purpose of providing a complete form of permanent government for the District of Columbia and for legislative substitution for all previous legislation enacted dealing with the same subject matter. It seems inescapable that, if this premise be correct, then the Acts of 1872 and 1873 as such, although not directly repealed, have both been repealed by implication."

In considering this ruling I think courts must be guided by the cardinal principles that repeal by implication is held in disfavor and that the intention of a legislature to repeal must be "clear and manifest." *United States v. Borden Co.*, 308 U.S. 188; *United States Alkali Export Ass'n v. United States*, 325 U.S. 196.

There is nothing in the temporary Organic Act of June 20, 1874, 18 Stat. 116, or in any provision of the permanent Organic Act of June 11, 1878, 20 Stat. 162, that can be said to repeal these Acts. Though great reliance is placed on *Eckloff v. The District of Columbia*, 4 Mackey 572, aff'd 135 U.S. 240, and *District of Columbia v. Hutton*, 143 U.S. 18, for the proposition that the provisions of the Organic Act repealed by implication a former provision of the Assembly, the cases are easily distinguishable. In both cases, which concerned Acts involving the local police force, the court could and did point to a specific power delegated to the Commissioners by the 1878 Act regarding appointment and removal of policemen which, on the facts, was so broad and inclusive that it was held not to be limited by any prior enactment on the same subject. In the *Hutton* case, the court made it clear that it was ruling that *only* Section 354 of the Revised Statutes for the District of Columbia was repealed by Section 6 of the Organic Act. Nowhere is there a ruling that *all* pre-existing laws were repealed. Moreover, in both

the *Eckloff* and *Hutton* cases there was presented a basic and fundamental conflict between prior enactments and the 1878 Act of Congress—a situation which by no means exists here. Also, both cases dealt with an administrative problem of the Government newly established by the 1878 Act, while in the case at bar we have no such problem: we deal only with an enactment regulating the conduct of certain businesses, which was not in any way covered by the 1878 Act. Hence it is plain to me that neither the *Eckloff* nor the *Hutton* decision gives support to the ruling below.

There is nothing in the Organic Act which can be held to directly affect or conflict with the Acts before us. The express words of the first section of the Organic Act are that "all laws now in force relating to the District of Columbia not inconsistent with the provisions of this Act shall remain in full force and effect." While the 1878 Act reorganized the form of the District Government and the administration thereof, it did not by implication or otherwise repeal, supersede or supplant the whole body of pre-existing law governing the District.

Was there any later legislation working a repeal of the Acts here involved? The trial court relied on the Licensing Act of July 1, 1902, 32 Stat. 622, and 27 Stat. 394 and 47 Stat. 550 as such legislation. Those statutes dealt primarily with the Commissioners' right to issue and revoke licenses of certain public places of amusement. It would be wrong to say that such statutes, dealing primarily with licensing, worked a repeal of former regulatory Acts.

We have been cited to no other later statute which is so expressly repugnant to the Acts in question as to require a ruling that it superseded them. In the absence of any such statute and in view of the many judicial determinations after the Organic Act holding Acts of the Legislative Assembly valid, the trial judge was in error in this ruling. *Cooper v. The District of Columbia*, MacArthur & Mackey (11 D.C.) 250 (1880); *District of Columbia v. Waggaman*, 4 Mackey (15 D.C.) 328 (1885); *District of Columbia v. Burgdorf*, 6 App. D.C. 465 (1895); *District of Columbia v. Weaver*, 6 App. D.C. 482 (1895); *Parsons v. The District of Columbia*, 8 App. D.C. 391 (1896); *Lasley v. The District of Columbia*, 14 App. D.C. 407 (1899); *Johnson v. District of Columbia*, 30 App. D. C. 520 (1908).

The next question is whether the Act of Congress establishing a Code of law for the District of Columbia (31 Stat. 1189) had any effect on the validity of the Acts. The language in section 1636 provides that all Acts of the General Assembly of the State of Maryland, all Acts and parts of Acts of the Legislative Assembly of the District of Columbia, and all Acts of Congress applying to the District of Columbia shall be repealed *with certain specific exceptions*. The most pertinent exceptions are set forth in Section 1636 and Section 1640. Under the first section, specifically excepted from repeal are "police regulations, and generally all acts and parts of acts relating to municipal affairs only . . ." (Emphasis supplied.) Section 1640 reads: "Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law . . . or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code." The Acts in question being merely regulatory in nature, it follows that by the plain terms of this section, the repealing clause had no effect on the Acts and that they were intended to and did remain in force.

The next argument deals with the 1872 and 1873 Acts in the light of several Code provisions, and of regulations promulgated much later by the Commissioners. Appellee argues that there is conflict between the 1872 and 1873 Acts, and other valid Acts in this jurisdiction and that the former Acts have been impliedly repealed by the later ones. Examining the general licensing laws, 32 Stat. 622, 47 Stat. 550, et seq., which are in effect in the District of Columbia (Code Sections 47-2301, 47-2327, 47-2345), I find, as already noted, that there is nothing in these statutes which is inconsistent with the Acts in question. The 1872 and 1873 Acts do not treat the matter of *issuance* of licenses, but only concern the revocation of a license when there has been a violation. There is no reason why the two laws cannot exist side by side without conflict. *United States v. Borden Co.*, 308 U.S. 188. See also *Richards v. Davison*, 45 App. D.C. 395, citing *District of Columbia v. Lee*, 35 App. D.C. 341; *U.S. ex rel Early v. Richards*, 35 App. D.C. 540. Nor are the Acts in question in any way inconsistent with other current restaurant and building regulations; all should be considered as

cumulatively binding. Certainly the fact that the Commissioners have from time to time promulgated additional regulations in no way affects a valid prior regulation. These regulations supplemented existing laws; they did not supersede them.

Appellee says that the Alcoholic Beverage Control Act of 1934, Code 1940, 25-101 et seq., superseded these Acts. Particular emphasis is placed on Section 25-121 which, among other things, prohibits sale of intoxicants to persons below certain age levels. The 1872 and 1873 Acts deal with an over-all regulation of various services (restaurants for example); the ABC Act merely places further restrictive regulations upon sales of liquor—which has traditionally been the subject of separate regulation. Both in their own way regulate a different aspect of public health, safety and order. They exist and operate concurrently. For practical purposes the later Act may be regarded as “merely affirmative, or cumulative, or auxiliary.” *Wood v. The United States*; 16 Pet. 342.

The argument is also made that even if the Acts were valid in their inception they are no longer valid because they have become obsolete and have not been enforced in this jurisdiction. The point is not well taken. A failure to enforce the law does not and cannot change it. See *Louisville & N. R. Co. v. United States*, 282 U.S. 740; *Standard Oil Co. v. Fitzgerald*, 86 F.2d 799, cert. den. 300 U.S. 683; “*C. B. & Q. R.R. Co. v. Iowa*,” 94 U.S. 155; *Kelly v. State of Washington*, 302 U.S. 1. See also *Costello v. Palmer*, 20 App. D.C. 210. Otherwise administrative officials could through inaction repudiate or work a repeal of any validly enacted legislation.

As will appear, Judge Hood is of the opinion that the Acts of 1872 and 1873 were invalid when enacted, and Judge Claggett is of the opinion that the Act of 1872 was repealed by the Act of 1873. Thus a majority of the court rules that the Act of 1872 has no operative effect and (since the first count was based on that Act) no prosecution can be maintained thereon. Consequently the order of the Municipal Court quashing the first count of the information will be affirmed.

But Judge Claggett and I agree that the Act of 1873 was valid when enacted and has not been repealed. Accordingly, it is the decision of this court that the order quashing the

second, third and fourth counts of the information must be reversed.

*Affirmed as to Count One
of the Information.*

*Reversed as to Counts
Two, Three and Four.*

CLAGETT, *Associate Judge*: I have concluded that the 1872 act was repealed by the 1873 act, and that the latter was valid when enacted and has not been repealed. As to the validity of the 1873 act particularly I disagree with much of the opinion of Chief Judge Cayton and therefore state my own opinion separately.

The resurrection after eighty years of statutes which appear in none of the modern codes or compilations of statutes relating to the District of Columbia requires explanation and something of historical background. This history began with the submission to the states of Art. 1, sec. 8, cl. 17 of the Federal Constitution providing that:

“The Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government * * *”

• In No. XLIII of the *Federalist*, James Madison gave the following contemporaneous explanation of the constitutional cause just quoted:

“The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of

their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated."

Provision for the District government was first made February 27, 1801, (2 Stat. 103, Code 1940, Historical, p. XXXIII). After the recession of the Virginia portion of the District, there remained in it as separate entities what became the City of Washington and also the City of Georgetown, as well as the outlying territory not included in either. By an act of Congress approved May 3, 1802, (2 Stat. 195, Code 1940, Historical, p. XXXIV) the City of Washington was first incorporated, with a mayor appointed by the President, and a city council of two houses to be elected annually.

By an act approved May 15, 1820, (3 Stat. 583, Code 1940, Historical, p. XXXIX). Congress passed a new act for

the incorporation of the City of Washington, repealing all acts theretofore passed for that purpose, creating a mayor and city council, providing for voting qualifications and enumerating various powers, including the power "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages, wagons, carts, and drays, pawn-brokers, venders of lottery tickets, money-changers, and hawkers and peddlars; to provide for licensing, taxing, regulating, or restraining, theatrical or public shows and amusements; to restrain or prohibit tippling houses, lotteries, and all kinds of gaming; to regulate and establish markets; * * * to provide for the establishment and superintendence of public schools."

By an act of Congress approved May 17, 1848, (9 Stat. 223, Code 1940, Historical, p. XLIII) the charter of Washington was amended by enumerating a long list of designated powers, including the power to "provide for licensing, taxing and regulating livery stables, and wholesale and retail dealers * * *." As to the territory within the District, but outside of Washington and Georgetown, Congress by the act of March 3, 1863, (12 Stat. 799, Code 1940, Historical, p. XLVIII) empowered the "Levy Court" to grant licenses to wholesale and retail dealers in goods, wares or merchandise "under such restrictions and penalties as the said Levy Court may deem expedient."

Eliminating discussion of intervening statutes of no immediate relevancy, we come now to the significant act of Congress approved February 21, 1871, (16 Stat. 419, Code 1940, Historical, p. LI et seq.) establishing for the first time a government for the entire District of Columbia. This act provided for a governor to be appointed by the President; a bicameral legislative assembly consisting of a council and house of delegates, a board of public works, and a non-voting delegate to the national Congress. Section 18 of the act provided:

"And be it further enacted, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article

of the Constitution of the United States, but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

This fundamental law was thoroughly discussed in Congress before its adoption.¹ Summing up the constitutional status of the District of Columbia, it has been said that the District is a separate political community in a certain sense and in that sense may be called a state whose sovereign power is lodged in the Government of the United States; but it is not strictly a state within the meaning of that term as used in the Constitution.² It must be kept constantly in mind that at the time of the creation of the District of Columbia as an entity separate from the states it included more than one municipality. In that sense, at least, it was like a state whose legislature enacts laws for the entire state, delegating to various municipalities the power to pass ordinances affecting only the inhabitants of those particular municipalities.

It is against this constitutional and legislative background that there must be considered the two acts of the legislative assembly invoked in the present case.³ Section 1 of the first act, that of June 20, 1872, provided that keepers or owners of restaurants and of certain other establishments were required to post a scale of prices for which

¹ See Cong. Globe, 41st Cong., 3rd Sess., pp. 643-644 (1871). The Star and the Daily National Republican were also published but were not official publications.

² *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1; *District of Columbia v. Tyrrell*, 41 App. D. C. 463.

³ These acts are printed in "Laws of District of Columbia," published by the Chronicle Publishing Company. In the preface of this publication signed by Edwin L. Stanton, Secretary of the District of Columbia, there appears the following: "In its preparation copies of the Acts of Congress, furnished and certified by the Department of State, have been used; and as to the Acts of the Legislative Assembly, the edition has been carefully collated and compared with the original rolls in the archives of the District." The acts of the legislative assembly referred to were passed by both houses of the legislative assembly and signed by the governor. These acts were thoroughly debated and such debates were duly reported in the newspapers of the day. Some of the briefs filed herein adopt misleading citations for the acts by referring to Abert and Lovejoy's Compilation of 1894. However this compilation was wholly unofficial and never received official sanction.

the different articles kept for sale would be furnished.⁴ Section 3 of that act provided:

"And be it further enacted, That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

The act of June 26, 1873, was more detailed. Section 1 provided for the posting of the common or usual prices to be charged. Section 2 provided that lists of such price or prices must be transmitted to the Register of the District. Failure to transmit such copies to the Register was punishable by fine and forfeiture of the license. Section 3 provided as follows:

"And be it further enacted, That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell

⁴ The agreed statement of facts discloses that the records of the District of Columbia fail to show that any local restaurant or eating house ever complied with this provision or that any demand for such price list was ever made. The same applies to the 1873 act. The local officials simply failed to enforce the law.

at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment: * * *."

The penalty provision was set forth in Section 4 which imposed a \$100 fine and a forfeiture of the license for one year.

There were several prosecutions for violation of the 1872 act, but no prosecution under the act of 1873.⁵

⁵ An agreed statement of facts signed by respective counsel, the contents of which are repeated in the briefs, recites that "There is no official record of any attempted prosecutions for violations of the terms of the legislative assembly act of June 20, 1872." It is further recited on information and belief, however, that there were four such prosecutions. Although not particularly important, these "facts" are incorrect. The records of the Supreme Court of the District of Columbia (now the United States District Court of the District of Columbia) show that actually there were five such prosecutions. In No. 9420, *District of Columbia v. Sebastian Aman*, filed September 17, 1872, Aman, a Ninth Street proprietor, was accused of refusing to sell whisky to a person of color. In the Police Court he was found guilty and fined \$100 and his license ordered forfeited. On appeal to the D. C. Supreme Court, December 6, 1872 (under a trial *de novo*) a jury was sworn and he was found not guilty. In No. 9451, *District of Columbia v. Henry Scherf*, filed October 11, 1872, defendant was found guilty in Police Court and fined \$30. On appeal to the D. C. Supreme Court, December 6, 1872, a nolle prosequi was presented by the District Attorney. In No. 9452, *District of Columbia v. Henry Scherf*, filed October 11, 1872, Scherf, a Pennsylvania Avenue proprietor, was accused of refusing to sell liquor to a person of color on July 29, 1872. In Police Court he was found guilty and fined \$100 and ordered to forfeit his license. On appeal to the D. C. Supreme Court he was found not guilty by a jury. In No. 9453, *District of Columbia v. Gottlieb Shorbie*, filed October 14, 1872, defendant, operating a restaurant at 7th and E Streets, was accused of refusing to sell beer because of color. In Police Court defendant was found guilty and fined \$100 and his license ordered forfeited. On appeal to the D. C. Supreme Court, December 5, 1872, on motion the information was quashed. In No. 9474, *District of Columbia v. Fred Freund*, filed November 25, 1872, defendant, proprietor of a restaurant at Pennsylvania Avenue and 11th Street, was accused of refusing to sell and wait on four colored persons in answer to a request for ice cream and cake to be eaten on the premises. In Police Court defendant was found guilty and fined \$100 and his license ordered forfeited. On appeal to D. C. Supreme Court, December 3, 1872, a nolle prosequi was presented by the District Attorney. These cases were fully reported in the Evening Star and the Daily National Republican of December 4, 5, 6, and 7, 1872. These reports show that the validity of the act was not passed upon.

The legislative assembly was abolished by the Temporary Organic Act of June 20, 1874, (18 Stat. 116, Code 1940, Historical, p. LVI et seq.) which provided for an interim form of commission government for the District of Columbia with separate school and police boards. No acts of the legislative assembly, however, were repealed. By the present Organic Act of June 11, 1878, (20 Stat. 102, Code 1940, Historical, p. LVIII et seq.) a permanent form of government for the District was established. The enacting clause of this statute provided: "Said District and the property and persons that may be therein shall be subject to the following provisions for the government of the same, and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act. * * * and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect." This act neither created new laws or regulations for the District nor repealed old ones except laws relating to the organization of the District. Instead it provided for the drafting of such additional laws and changes in old ones as might be subsequently reported to Congress.

Congress in 1901 passed a new Code of Laws for the District of Columbia, (31 Stat. 1189). Section 1 provided that: "The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code." Section 1636 of the 1901 Code provided that: "All acts and parts of acts of the general assembly of the State of Maryland, general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except: * * *." There followed eleven

exceptions (not repealed) only three of which appear relevant to the present question, namely: "Third. Acts and parts of acts relating to the organization of the District government, * * * or to police regulations, and generally all acts or parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations" and "Fifth. All penalty statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." The 1901 Code was the last which was enacted by Congress. Two other codes were compiled, one in 1929, and one in 1940, but neither received the official approval of Congress. Neither the 1901 (official) nor the 1929 or 1940 (unofficial) codes included either of the acts of the legislative assembly here discussed.

I.

The Validity of the Acts of the Legislative Assembly.

The chief argument against the validity of these acts is that Congress under the Constitution could delegate to the legislative assembly, or any other government for the District of Columbia, only the power to make "municipal" and "police" regulations and could not delegate to any local government the power to enact "general" legislation. This statement of the law is supported by every extant authority.⁶

We must determine, then, whether the acts in question were "police regulations." The argument is made that they were police regulations because they were passed under the police power. Police power is the inherent right of a nation or state or city to regulate the health, safety, comfort, or welfare of its citizens. It would be a waste of time to accumulate definitions. In its final analysis it has been defined as the power to govern.⁷

Laws and ordinances relating to the comfort, health, and good government of the inhabitants of a city are ordinarily described as "police regulations," and, though they may disturb the full enjoyment of a personal right, they

⁶ *Yakus v. United States*, 321 U. S. 414; *Roach v. Van Riperick*, MacA. & M. 41 D. C. 171; *Smith v. Olcott*, 19 App. D. C. 61; *United States v. Cella*, 37 App. D. C. 433; *Johnson v. District of Columbia*, 30 App. D. C. 520; *United States ex rel. Daly v. MacFarland*, 28 App. D. C. 552.

⁷ See *Slaughter-House Cases*, 83 U. S. 36; *Stone v. Mississippi*, 101 U. S. 814.

are constitutional, notwithstanding they do not provide compensation therefor, for they do not appropriate private property for public use but merely regulate the enjoyment by the owner, who is supposed to be compensated by sharing in the benefits which such regulations are intended to secure.⁸

While all police regulations must be justified under the police power, it does not follow that all measures supported by the police power are deemed police regulations. In other words, police regulations and the police power are not the same. It is merely a play on words to say they are. There is a difference, but there is no accepted outline of the scope of the two terms.

In the states the answer is not too difficult. It is largely a matter of territorial extent. A question affecting the people of the entire state is left to the state legislature; a question which concerns only the people of different communities is left to the cities. The problem is complicated here by the fact that the legislative assembly legislated for the entire District just as a state legislature does.

It is argued here that the distinction between general legislation and municipal regulations or police regulations, is that the first affects *rights* while the other does not. It is also said these acts were not police regulations because they affected "policy" or the mores of the community. It is conceded (as I think it must be conceded) that Congress itself could have passed these acts, but that since they gave Negroes new *rights*, it is urged they were beyond the local power of the legislative assembly.

I have no doubt that the acts did confer new rights not created by the Thirteenth, Fourteenth, and Fifteenth Amendments or by any legislation enacted by Congress pursuant to those amendments.⁹ I think it merely begs the question to claim that they did not.

But I have concluded that the acts, conferring new rights as they did, were constitutional and valid. I so conclude because it is axiomatic that an act of a legislature is presumed to be constitutional,¹⁰ and I have heard no argument

⁸ *Atlantic City v. France*, 75 N. J. L. 910, 70 Atl. 168.

⁹ "The Civil Rights Cases," 109 U. S. 3.

¹⁰ *Gillow v. People of The State of New York*, 268 U. S. 652.

which overcomes this presumption. I think the true rule as to what acts the legislative assembly of the District of Columbia could not pass is that it could not pass acts regulating interstate commerce,¹¹ or regulating the processes of the United States courts,¹² or affecting the national or general interest in some other respect. True, other tests have been mentioned, but I do not think they are supportable. We have been cited to no case, and I know of none that holds that the creation of new rights or a new policy is the mark of "general legislation." On the other hand, local option liquor laws, for example, have long been upheld as within the power of municipalities. Could any legislation affect policy more or more directly change the mores of a community?

Acts of the legislative assembly have been upheld which exempted from D. C. taxation local property used for manufacturing purposes¹³ and prohibiting cruelty to animals, to mention only two of the most notable cases.¹⁴ Certainly the first of those acts created rights and established a policy.

I have concluded that the true test of what is a police regulation in the municipal sense is not whether it creates a right or changes the mores of a community or establishes a policy. All regulations and legislative acts do these things in greater or less degree.

The true test, I believe, is whether the act or regulation is really local. The whole theory of our constitutional form of government is that local matters should be governed by local people. Closely examined, the other tests really come down to this one.

And judged by this test I am forced to the conclusion that these acts were truly municipal. They would, of course, affect visitors to the city, but the same is true of all important police regulations. They affected no national interest; they did not interfere with interstate commerce; they interfered with no rights of the states; they were local in every sense of the word. Granted, as has been thoroughly established, that a state may pass such

¹¹ *Stoutenburgh v. Hennick*, 129 U. S. 141.

¹² *Roach v. Van Riserick, MacA. & M.* (11 D. C.) 171.

¹³ *Welch v. Cook*, 7 Otto (U. S.) 541.

¹⁴ *Johnson v. District of Columbia*, 30 App. D. C. 520.

legislation, I think it follows that, when authorized by Congress to do so, the local legislature had the same power.

I have concluded that the power which *can* be delegated by Congress to a District government is broad enough to include these acts, that the necessary power *was* delegated and therefore that the acts were constitutional when passed.

II.

Are the Acts Discriminatory?

It is argued that the acts were unreasonable and arbitrary in that they undertook to set up and apply unreasonable and arbitrary classifications and distinctions. But I do not believe that appellee can complain because *all* businesses were not included. At the present time, at least, all races are served in most business establishments in the District. I do not believe the acts are open to attack on this ground.¹⁵

III.

Did the 1873 Act Repeal the 1872 Act?

The first count of the information was based upon the 1872 act and the second, third, and fourth counts were based upon the act of June 26, 1873. Appellee urged that the first act was repealed by the second. As already recited, the 1873 act provided that "all acts and parts of acts inconsistent herewith are hereby repealed." While generally similar, the two acts differ in material respects. The penalties for failing to post prices are different and conflicting. The 1873 act makes no reference to barber shops or bathing houses as did the 1872 act. Moreover the 1873 act required service to "any respectable, well-behaved person" whereas the 1872 act referred to race, color, or other condition of servitude, one of the provisions which had caused difficulty in the courts. It might be possible to mesh the two acts together, but the effort would be difficult. Moreover, it is clear that the efforts to enforce

¹⁵ *Zahn v. Board of Public Works*, 274 U.S. 325, and cases cited therein.

the 1872 act had failed.¹⁶ The 1873 act was much more detailed. It referred only to "licensed" establishments, whereas the 1872 act was ambiguous in this respect. It seems clear that the effect of the 1873 act was to repeal the 1872 act, at least so far as restaurants are concerned. It follows that, in my opinion, the first count of the information must stand quashed.

IV.

Has the 1873 Act Been Repealed?

Two congressional enactments are relied on chiefly as repealing, expressly or by implication, the 1872 and 1873 acts of the legislative assembly. (As a matter of convenience, both acts are referred to.) These are the Organic Act of June 11, 1878 (20 Stat. 102) establishing a permanent form of government for the District, and the 1901 Code of Laws for the District (31 Stat. 1189, Act of March 3, 1901.) The trial court held that the legislation was repealed by implication by the Organic Act of 1878. I find no sound basis for this conclusion. Certainly the 1878 act did not repeal these acts directly; it only repealed "all laws inconsistent with the provisions of this act"; and I find nothing inconsistent in the new enactment with the old ones. Neither can I find anything in subsequent licensing acts or regulations to repeal the 1872 and 1873 acts.

The next question is whether the acts were repealed by the 1901 Code. Section 1 of the 1901 Code provided:

"The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of passage of this act shall

¹⁶ The Evening Star indicated that the 1873 bill was introduced to correct the deficiencies of the earlier act, saying: "Mr. Brooks (who introduced C. 61) said he regretted the necessity of such a law but it had come to his knowledge that it was highly necessary, in consequence of the law passed at the last session of the legislature being defective, and consequently inoperative." The bill was passed by the lower house, representing the wards of the city, by a vote of 17 to 1.

remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this Code."

It is clear, therefore, that these acts of the legislative assembly were not specifically continued in force. But were they repealed?

Section 1636 provided:

"All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:"

There follow nine groups of exceptions, of which only the third and fifth are pertinent. The third exception provides:

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public service corporations." (Emphasis supplied.)

The fifth exception provides:

"Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both."

Section 1636 concludes:

"All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent

with or are replaced by the provisions of this code."

Section 1640 does not establish further standards but acts as a "reassurance" provision in that it restates those laws already specified in Section 1 which shall remain in force. It reads:

"Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of the principles of equity or admiralty, or of any general statute of the United States not locally in applicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

In other words, the act repealed all acts of the legislative assembly "general and permanent in their nature" except "police regulations" and acts "relating to municipal affairs only." Therefore if these acts of the legislative assembly were more than police regulations, then the assembly had no power to enact them. If they were police regulations or acts relating to municipal affairs, then they were not repealed by the 1901 Code.

Having in mind the background of the acts, I have reached the conclusion that they were not repealed by the 1901 Code nor by any other act of Congress. Congress has always had the power to repeal these acts of the legislative assembly. I conclude, however, that it has not done so.

In the old case of *Roach v. Van Renswick, MacA. & M.* (11 D. C.) 171, 172, 173, decided by the general term of the District Supreme Court, occurs a discussion which may indicate the real reason why several of the acts of the legislative assembly have been declared unconstitutional. The court said:

“There has been an instinctive reluctance on the part of bench and bar, to recognize the legislation of the late government of the District as valid, so far as it transcended the limits of strictly municipal action. This sentiment has hardly shaped itself into a definite opinion or formulated the reasons for its existence. It has sometimes sought its excuse in the want of positive confirmation by Congress of the legislation in question. This, however, is a very unsatisfactory foundation for it. The organic act, as it is called, i. e., the act of February 21, 1871, which establishes the District government, nowhere contains an intimation that the acts of the new government are to be inoperative until or unless confirmed by Congress; but, on the contrary, by the strongest implication, excludes such idea. The 50th section declares that all acts of the legislative assembly shall at all times be subject to *repeal* or *modification* by the Congress of the United States. Until repealed or modified, the clear implication is that they are to operate, *proprio vigore*. If Congress had first to approve, it is obvious that its judgment as to the rightfulness or expedience of measures submitted to them would be exercised then, and it was unnecessary to reserve it expressly, or the occasion when legislation once in force, is to be reviewed in order to modify or annul it. It is plain to us that as far as Congress could confer the power of original and independent legislation, needing no confirmation, but complete and operative in itself, it has done so by the act in question. The unwillingness so generally felt to give effect to this legislation grows partly out of a lurking doubt which existed from the beginning and has never been dispelled, as to the constitutional power of Congress to create such an anomalous entity as the late District government, and to invest it with the powers which the act of 1871 purports to convey.”

But Congress *did* create such a body. It later decided it had made a mistake. It soon abolished the “anomalous

entity" it had created. It still has the unquestioned power to repeal this act. Until and unless Congress acts specifically, I believe the 1873 act of the legislative assembly must stand.

I would reverse the judgment of the trial court except as to the first count of the information.

Hood, *Associate Judge*, dissenting: In 1879 the Supreme Court of the District of Columbia held invalid an act of the legislative assembly on the ground that it "was an act of legislation which it was only competent for the Congress of the United States to pass." *Roach v. Van Riswick, MacArthur & Mackey*, 171, 187. In the following year the same court, construing its previous opinion, said: "All that was decided there was that Congress had no right to bestow upon the legislative assembly of the District any powers which were not necessary for it as a *municipality*." *Cooper v. The District of Columbia, MacArthur & Mackey*, 250, 251. In 1889 the Supreme Court of the United States, holding an act of the legislative assembly invalid, said: "But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do." *Stoutenburgh v. Hennick*, 129 U. S. 141, 147. In 1901 the Court of Appeals of the District of Columbia, holding an act of the legislative assembly invalid, said: "It is not a mere local regulation within the scope of the powers ordinarily delegated to municipal corporations, but an attempt at the exercise of a general legislative power over the freedom of contracts." *Smith v. Olcott*, 19 App. D. C. 61, 75. In 1905 the Court of Appeals, in referring to the powers of the Commissioners of the District, said: "Congress has reserved to itself, not only the power of legislation in the strict sense of the term, which it cannot constitutionally delegate to anyone or to any body of men, but even the power of enacting municipal ordinances, such as are within the ordinary scope of the authority of incorporated municipalities." *Coughlin v. District of Columbia*, 25 App. D. C. 251, 254. In 1908, upholding an act of the legislative assembly, the Court of Appeals, cit-

ing the *Stoutenburgh* case, said: "We think it clear that the two sections of the act above referred to, which, it will be observed, are complete in themselves, are mere police regulation, and therefore within the scope of powers delegated to the municipality by Congress." *Johnson v. District of Columbia*, 30 App. D. C. 520, 522.

In the face of these expressions of the highest courts of this jurisdiction, stated over a period of many years, I think we must hold that the legislative power of the legislative assembly was limited to the passage of police regulations and municipal ordinances, and I understand my colleagues, as well as counsel for the District, to agree, at least to some extent, with this conclusion.

While the distinction between general legislation and police or municipal regulation is not always clear,¹ it seems rather obvious to me that the legislation here in question was civil rights legislation, rising to a higher plane or dignity than mere regulation of restaurants and other places of public entertainment. The many cases, both federal and state, dealing with civil rights legislation, make it plain that such legislation concerns itself with rights rather than regulation, although such rights may be guaranteed or enforced through regulation.²

Certain briefs filed with us assert that legislation of this type has been commonly enacted by municipalities, but no case is cited upholding the enactment of civil rights legislation by municipal ordinance. In the only case I have found where a municipality attempted to pass such a regulation, it was held to be beyond the power of the city. *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773.

If, as I read the cases, the legislative assembly was limited in its legislative power to the enactment of police and municipal regulations; and if, as I believe, the enactments in question cannot be properly classified as such, then it follows that such enactments were ineffective. Reaching this conclusion, I find it unnecessary to discuss other points raised in the case.

¹ *United States v. Cella*, 37 App. D. C. 433, cert. denied, 223 U. S. 728.

² E.g. *The Civil Rights Cases*, 109 U. S. 3; *People v. King*, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293; *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31; *Piluso v. Spencer*, 36 Cal. App. 416, 172 P. 412; *Anderson v. Pantages Treater Co.*, 114 Wash. 24, 194 P. 813; *Bob-La Excursion Co. v. People of State of Michigan*, 333 U. S. 28.

Judgment*Thursday, May 24, 1951*

The Court met pursuant to adjournment. Present: The Honorable Nathan Cayton, Chief Judge; Andrew M. Hood and Brice Clagett, Associate Judges.

No. 967

October Term, 1950

DISTRICT OF COLUMBIA, *Appellant*,

v.

JOHN R. THOMPSON COMPANY, INC., a body corporate,
Appellee.

Appeal from the Municipal Court for the District of Columbia, Criminal Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, affirmed as to Count One of the Information; and reversed as to Counts Two, Three and Four, and that this cause be, and it is hereby, remanded to the said Municipal Court for further proceedings in accordance with the opinion of this Court.

NATHAN CAYTON,
Chief Judge.

Separate Opinion By:

BRICE CLAGETT,
Associate Judge.

Dissenting Opinion By:

ANDREW M. HOOD,
Associate Judge.

May 24, 1951.

[fol. 56] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,039

JOHN R. THOMPSON COMPANY, INC., a Body Corporate, Petitioner,

vs.

DISTRICT OF COLUMBIA, Respondent

No. 11,044

DISTRICT OF COLUMBIA, Petitioner,

vs.

JOHN R. THOMPSON COMPANY, INC., a Body Corporate, Respondent.

ORDER ALLOWING APPEALS—Filed July 5, 1951

Before: Prettyman, Proctor, and Washington, Circuit
Judges.

On consideration of the petitions for allowance of appeals from the judgment of the Municipal Court of Appeals for the District of Columbia, entered May 24, 1951, in the above-entitled cases, and of the briefs filed in connection therewith, it is

Ordered by the Court that appeals from said judgment of the Municipal Court of Appeals herein be, and the same are hereby, allowed.

Per Curiam.

[File endorsement omitted.]

[fol. 57] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER ALLOWING THE CONSOLIDATION OF APPEALS—Filed
July 20, 1951

.. Upon consideration of the motion of John R. Thompson Company, Inc., to consolidate the above-entitled appeals for the purpose of filing of briefs and for hearing, and it appearing that the District of Columbia consents thereto, it is

Ordered by the Court that the motion be, and it is hereby, granted, John R. Thompson Company to file the first brief.

Per Curiam.

[File endorsement omitted.]

[fol. 58]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

[Title omitted]

ORDER SETTING CASES FOR HEARING IN BANC—Filed October
6, 1951

Before: Stephens, Chief Judge, Edgerton, Clark, Wilbur K.
Miller, Prettyman, Proctor, Bazelon, Fahy and Washing-
ton, Circuit Judges, in chambers

It is ordered by the court sua sponte that the above-en-
titled cases be, and they are hereby, set for hearing in banc,
on such date as the business of the Court will permit.

Per Curiam.


Circuit Judge Clark did not participate in the above
order.

[File endorsement omitted.]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—JANUARY 7,
1952—Omitted in printing.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11039

JOHN R. THOMPSON COMPANY, INC.,
a body corporate, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

No. 11044

DISTRICT OF COLUMBIA, APPELLANT

v.

JOHN R. THOMPSON COMPANY, INC.,
a body corporate, APPELLEE

Appeals from the Municipal Court of Appeals
for the District of Columbia

Decided January 22, 1953

Mr. Ringgold Hart, with whom *Messrs. John J. Wilson*
and *Jo V. Morgan, Jr.*, were on the brief, for John R.
Thompson Company, Inc., appellant in No. 11039 and ap-
pellee in No. 11044.

Mr. Chester H. Gray, Principal Assistant Corporation
Counsel for the District of Columbia, with whom *Messrs.*

Vernon E. West, Corporation Counsel, Edward A. Beard, Assistant Corporation Counsel, and Clark F. King, Assistant Corporation Counsel, were on the brief, for the District of Columbia, appellee in No. 11039 and appellant in No. 11044.

Messrs. Phineas Indritz and S. Walter Shine, by special leave of Court, for American Civil Liberties Union, Inc., et al., *amici curiae*.

Mr. Philip B. Perlman, Solicitor General, filed a brief on behalf of the United States of America as *amicus curiae*, urging the validity of the Equal Service Acts of 1872 and 1873.

Messrs. James A. Cobb, Harry C. Lamberton and Joseph Forer, filed a brief on behalf of the District of Columbia Chapter, National Lawyers Guild, as *amicus curiae*, urging the validity of the Equal Service Acts of 1872 and 1873.

Miss Margaret A. Haywood filed a brief on behalf of A. Powell Davies, et al., as *amici curiae*, urging the validity of the Equal Service Acts of 1872 and 1873.

Messrs. Phineas Indritz and George Bunn filed a brief on behalf of the American Veterans Committee, Inc., as *amicus curiae*, urging the validity of the Equal Service Acts of 1872 and 1873.

Before STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, PROCTOR, BAZELON, FAHY and WASHINGTON, Circuit Judges.

Chief Judge Stephens announced the judgment of the court and an opinion in which Circuit Judge Clark, Circuit Judge Miller and Circuit Judge Proctor concurred, and in the result of which Circuit Judge Prettyman concurred.

By the Act of February 21, 1871, 16 Stat. 419, c. LXII, the Congress created a Legislative Assembly for the District of Columbia, consisting of a Council

and a House of Delegates, the council to be appointed by the President, with the advice and consent of the Senate, the House of Delegates to be elected by the male citizens of the United States resident in the District.¹ The Assembly existed only until June 20, 1874, when, by the Organic Act of that date, 18 Stat. 116, it was disestablished. By an Act of June 20, 1872, D. C. Laws 1871-72, pt. IV, c. LI, §3, the Assembly made it a misdemeanor for any restaurant keeper to refuse to serve any respectable well-behaved person, without regard to race, color or previous condition of servitude. The enactment provided that upon conviction of the offense defined a restaurant keeper should be fined one hundred dollars and should forfeit his license for one year. The text of the enactment, so far as here pertinent, is set forth in the margin.² A further enactment with similar objective and sanction was passed by the Assembly on June 26, 1873, D. C. Laws 1873, pt. II, c. XLVI, §§3 and 4. The

¹ Sections 5 and 7 of the Act particularized the manner of appointment and election and the qualifications of the members of the Council and the House of Delegates and the qualifications of voters.

² Sec. 3 provided: That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture.

text of that enactment, so far as here pertinent, is also set forth in the margin.³

On August 1, 1950, the Corporation Counsel for the District of Columbia filed in the Municipal Court for the

³ Sec. 3 provided: That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment: . . .

Sec. 4 provided: That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, . . . shall refuse or neglect, in person or by his, her, or their employé or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: Provided, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

District an information charging the John R. Thompson Co., Inc., as a restaurant keeper in the District, with violation of the enactments of 1872 and 1873—by refusal of service, solely because they were members of the negro race, to named well-behaved and respectable persons. The information was in four counts, the first charging violation of the enactment of 1872, the second, third and fourth with violation of the enactment of 1873. The Municipal Court, acting *sua sponte*, entered an order quashing the information upon the ground that both enactments had been repealed by the Organic Act of June 11, 1878, 20 Stat. 102. The District took an appeal from that order to the Municipal Court of Appeals. That court, as to the first count of the information, affirmed the order of the Municipal Court, Judge Hood being of the view that both the 1872 and 1873 enactments were invalid as beyond the power of the Assembly, Judge Claggett thinking that the 1872 enactment was repealed by the enactment of 1873. As to the second, third and fourth counts of the information, the Municipal Court of Appeals reversed the order of the Municipal Court, Judge Claggett being of opinion that the 1873 enactment was valid when enacted and that it had never been repealed, Chief Judge Cayton being of the view that both the 1872 and 1873 enactments were valid when enacted and that neither of them had been repealed. The Thompson Company petitioned this court for the allowance of an appeal from the judgment of the Municipal Court of Appeals in so far as it reversed the order of the Municipal Court quashing the information as to the second, third and fourth counts. The District, on its part, petitioned for the allowance of a cross-appeal from the judgment of the Municipal Court of Appeals in so far as it affirmed the order of the Municipal Court in quashing the information as to the first count. We granted both petitions, and ordered the appeal and the cross-appeal heard in banc.

As the appeals stand before this court on the record and briefs they present two principal questions: The first, were the enactments of the Legislative Assembly of 1872 and 1873 on which the information against the Thompson Company was based within the power of the Assembly; the second, were those enactments repealed.

I.

Were the enactments of 1872 and 1873 within the power of the Legislative Assembly? We think the answer to that question lies in certain constitutional provisions and principles and in certain rulings and reasoning of the Supreme Court and of this court and of its predecessor, the Supreme Court of the District of Columbia in General Term, which we shall briefly review.

The Constitution in Article I, Section 8, Clause 17, endows Congress with power "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States" The Act of February 21, 1871, creating the Legislative Assembly for the District of Columbia, provided in Section 1:

That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

In Section 5 the Act provided, *inter alia*:

That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided.

In Section 18 the Act provided:

That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

In December 1888, there was submitted to the Supreme Court of the United States a case which for the first time in that Court questioned the power of the Legislative Assembly, to wit, *Stoutenburgh v. Hennick*, 129 U. S. 141, decided in January 1889. The Assembly, by an Act of August 23, 1871, amended June 20, 1872, forbade "commercial agents"—persons whose business it is, as agent, to offer for sale goods, wares or merchandise solely by sample, catalogue or otherwise—to engage in that business in the District of Columbia without having first obtained a license to do so. An agent of a Baltimore, Maryland, merchandise firm was convicted in the District of a violation of that enactment and was sentenced to a fine and, in default of payment of the same, to the workhouse. In a habeas corpus proceeding he attacked the validity of the enactment upon which the conviction rested upon the ground that, as applied to persons soliciting in the District the sale of goods on behalf of those doing business outside of the District, it was a regulation of interstate commerce and hence within the exclusive power of Congress. The decision of the Supreme Court in the case is important here because of a distinction made and the reason given therefor. The Court, speaking through Chief Justice Fuller, said:

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has

never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do. [129 U.S. at page 147]

Applying the foregoing, the Court said that while the enactment of the Assembly had manifestly been regarded as a regulation of a purely municipal character, it could not be so treated because it was, as applied to the defendant, a regulation of interstate commerce; it was therefore void. The Court concluded:

In our judgment Congress, for the reasons given, could not have delegated the power to enact the 3d clause of the 21st section of the act of assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely [129 U.S. at page 149]

In a second case in the Supreme Court, *Metropolitan Railroad v. District of Columbia*, 132 U. S. 1 (1889), the question, in a suit brought by the District to recover from the Railroad moneys expended by the former in paving construction which was allegedly the statutory duty of the Railroad, was whether the District was a municipal body and as such subject to the running of the statute of limitations, or a sovereign, or, as the District contended, of such sovereign character or so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty. In deciding that the District was subject to the statute of limitations, the Supreme Court, in an opinion by Mr. Justice Bradley, reasoned as follows:

... All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. ... It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. [132 U.S. at pages 8-9]

Turning to the decisions of this court and of its predecessor: In *District of Columbia v. Saville*, 1 MacArthur's Reports 581 (1874), an information charged violation of an Act of the Legislative Assembly of June 23, 1873 "to regulate shows and exhibitions in the sale and disposal of seats." The Act, upon pain of a fine, forbade the proprietors of theatres from selling tickets, after the opening of an exhibition, so as to reserve particular seats not reserved by the sale of tickets previous to the opening. The information was quashed by the Supreme Court of the District in General Term upon the ground that the enactment was beyond the power of the Assembly. The court said:

The provisions of the act are attempted to be justified on the ground that it is a mere police regulation, and as such, within the competence of the late legislative assembly to enact. We are all of the opinion that the act has nothing whatever of the character of a police regulation, but on the contrary that it is an unwise, vexatious and unlawful interference with the rights of private property. [1 MacArthur's Reports at page 584]

In *Roach v. Van Riswick*, MacArthur and Mackey's Reports 171 (1879), there was presented to the Supreme Court of the District in General Term the question

whether or not an Act of the Legislative Assembly of August 2, 1871, making judgments a lien on equitable interests in land, was within the power of the Assembly. In an opinion from which, for full understanding, we must quote at some length, the court ruled that it was not. The court said:

Among the other powers conferred by the Constitution, is the power to 'exercise *exclusive* legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States.'

It may be admitted that the term 'exclusive' has reference to the States, and simply imports *their* exclusion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to that of Congress and created by it. For enlightenment on this latter subject, we must look to those general principles in regard to the nature of legislative power which seem to be recognized by the authorities.

In this country, where the principles of constitutional law are better understood than elsewhere, it seems perfectly established that the power conferred by a constitution on a legislative body, to make laws, cannot be delegated by that body to any other body or authority, but is regarded as a kind of personal trust reposed in the legislators, the mode of whose election is supposed to contain guaranties of their judgment, wisdom and patriotism.

* * * * *

But this fundamental rule, which forbids the delegation of legislative power, is subject to a qualification. It is admitted, that even without any express constitutional authority, a legislature may create municipal corporations with certain powers of local government. According to the spirit of our institutions, the regulation of local concerns in a town, is considered as properly belonging to its inhabitants, and not properly the subject of general legislation; and it is hardly looked upon as a delegation of *legislative* authority, properly so-called, to confer this power of regulation on local boards, assemblies, or other inferior officers. It is rather the grant of a power to pass by-laws. Legislative authority for *corporate* action is of course necessary, and it is always subject to legislative revision and control. But municipal regulation of the internal economy of a town, is universally recognized as something distinct from the exercise of legislation, which is invested by the constitution of a State in its legislature and cannot be delegated. Cooley Con. Lim., 191. [MacArthur and Mackey's Reports at pages 174-176]

The court then pointed out that while "it is difficult to draw the line between powers that are strictly municipal, and may rightly be conferred on local corporations, and those which are properly legislative and cannot be delegated . . . this difficulty does not disprove the existence of such a dividing line." The court then said:

Notwithstanding the difficulty of laying down general rules, there are some subjects to which we can, with reasonable certainty, assign their proper place, as between the State and the municipality. Thus, universal usage and legislation recognize the preservation of public order, morals and health, the regulation of markets and places of amusement, the inspection of provisions, the improvement and repair of streets, and, as an incident to the others, the levying of general taxes and special assessments, as appropriate powers of a municipality.

On the other hand, titles to property, its transfer and transmission, the form and effect of judicial proceedings, the formalities and effect of contracts, the law of commercial papers, the whole subject of crimes and other subjects of equally general interest, one would naturally assign to the highest legislative authority in a State.

There might be twenty municipalities in one State. Each might have its own powers and its own mode of exercising them, as to the subjects which I have mentioned, as proper to be handled by it. But it is apparent, that the second class of subjects that I have mentioned, should be dealt with by laws operating uniformly through a State. It would never do to have different rules of property, different laws of contract generally, or of commercial papers in particular, different legal proceedings and remedies, and different criminal codes in the different municipalities of a State. It is very plain that the disposition of these subjects by law is the exercise of legislative power, and that, when that is constitutionally vested in a definite legislative body, it cannot, in the nature of things, be delegated to another. The power of making laws derived directly from the people is legislative; the power of local regulation derived from the legislature is municipal, no matter how limited or extensive the locality embraced by it.

These conclusions will apply to the Congress of the United States, even if we regard it as a mere local legislature, in its relations with the District of Columbia. When it assumed jurisdiction over the District, it found two corporations, Alexandria and Georgetown, in existence, and a few years later it created third, the city of Washington. Each one of those corporations had a charter, and all the charters differed more or less in detail.

while the general features of municipal charters were common to all. It would have been preposterous for Congress to have committed to each the power of regulating or ordaining legal proceedings and remedies, establishing the law of contracts, &c., within their respective corporate limits. Three or four different systems of law would have prevailed; the creatures of municipal action; and great confusion and perhaps conflict would have prevailed. Each one of these was essentially a municipal corporation, exercising derivative powers of local regulation, and if they had been all consolidated, it is not perceived that their essential character would have been changed.

But there are still more important considerations influencing this question.

Congress is not a *local* legislature in reference to this District, but it legislates for this District in its character as a national legislature.

* * * *

Judge Marshall said: 'In the enumeration of the powers of Congress, which is made in the 8th section of the 1st article, we find that of exercising exclusive legislation over such District, &c., &c. This power, like all others which are specified, is conferred on Congress *as the legislature of the Union*; for strip them of that character and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union, for it is in that character alone that the Constitution confers on them this power of exclusive legislation. This proposition need not be enforced,' &c., &c.

It is matter of history that the legislation of Congress respecting the internal affairs of the District has in various instances had direct reference to the interests of the people of the States. Thus, non-resident executors and administrators from the States, by act of 1812, were allowed to sue and recover claims in the courts of the District. So, at a later date, it is a matter of private history, that the arrest for debt, heré, of a visitor from a State, was the occasion of the abolition by Congress of imprisonment for debt. Other illustrations might be given showing that in practice, as well as theory, the legislation of Congress, for this District, is the exercise of one of the powers conferred on it, as the national legislature.

If this be so, then this power is to be viewed in the same light as the other powers conferred on Congress, viz., those of regulating commerce, borrowing money on the credit of the United States, coining money, &c., &c.

Now, if we suppose Congress to have conferred on the corporation of Washington, or any other municipal body here, the power to regulate commerce between the northern and southern States,

in its transit through the District, as, by levying tolls on transportation of persons and freight; or of establishing a mint and coining money, &c., we would at once see how glaring an abdication and transfer of its proper functions Congress would be guilty of. The same might be said if Congress had authorized the corporation of Washington to legislate for the District of Columbia. But according to what has been shown, it would be none the less such for Congress to delegate to a municipality of its own creation the power of general legislation, expressly confided to it by the Constitution over this District, including, as in this case, the power to regulate the practice of the courts of the United States here, and to determine the effect of their judgments, and thus change the common law of titles derived by us from Maryland, which could only be changed by an act of legislation of the most authoritative character. [MacArthur and Mackey's Reports at pages 178-181]

The Court had been referred in the argument of the case to the laws establishing governments in the territories as an example of the delegation of its legislative authority by the Congress which had received the sanction of judicial authority. But the Court concluded that that was not a pertinent subject, saying:

Non nostrum est tantas componere lites, but until it can be considered as settled, that the 'power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States,' is identical with the power to exercise exclusive legislation over such District as may become the seat of government, the practice of Congress in regard to the territorial government furnishes us no authoritative guide in the interpretation of the clause relating to the District of Columbia. [MacArthur and Mackey's Reports at pages 182-183]

Finally the Court ruled:

Our conclusion, on the whole, is, that the act of the District legislature declaring judgments rendered by this court to be liens on equitable interests in land, was an act of legislation which it was only competent for the Congress of the United States to pass, and was in itself totally inoperative and void, and the decree rendered by the court below must be reversed. [MacArthur and Mackey's Reports at page 187]

In *Cooper v. District of Columbia*, MacArthur and Mackey's Reports 250 (1880), the enactment of the Legis-

lative Assembly of August 23, 1871, amended June 20, 1872, which was under consideration in *Stoutenburgh v. Hennick*, supra, in its application to persons soliciting in the District the sale of goods on behalf of those doing business outside of the District, was held within the rightful power of the Assembly in so far as it required produce dealers to take out a license. The Supreme Court of the District in General Term characterized *Roach v. Van Risswick*, supra, as follows:

All that was decided there was that Congress had no right to bestow upon the legislative assembly of the District any powers which were not necessary for it as a municipality; but the decision expressly, in more than one place, declares that whatever was granted by Congress to the legislative assembly of the District, in respect to matters properly pertaining to municipal government, was a valid grant. [MacArthur and Mackey's Reports at page 251]

In *Smith v. Olcott*, 19 App. D. C. 61 (1901), the validity of the enactment of the Legislative Assembly of August 23, 1871, amended June 20, 1872, was again in question, in that instance in respect of a provision fixing absolute fees and commissions for auctioneers in sales of real or personal property. The enactment was relied upon in justification of an item in a trustee's account for auctioneer's charges for a sale of real estate under a trust deed. This Court of Appeals held the enactment invalid. The court said:

Congress has express power 'to exercise exclusive legislation in all cases whatsoever,' over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes,' could only authorize it to exercise municipal powers.

Applying this rule to the clause of the section, above quoted, we are of the opinion that its enactment was beyond the power conferred upon the District assembly.

It is not a mere local regulation within the scope of the powers ordinarily delegated to municipal corporations, but an attempt at the exercise of a general legislative power over the freedom of contracts.

It is essentially different from the power exercised in other parts of the act in the matter of regulating the occupation of auctioneers, and laying a license tax upon the same.

It also differs from those enactments, frequently made by municipal bodies under special delegations of power, which regulate the charges, by fixing a maximum rate, of all persons engaged in certain particular callings, as for example, hackmen who make special use of the public streets and places in the pursuit of their regular calling.

It will be observed that the regulation in question does not undertake to fix a maximum rate of charges for auctioneers, leaving parties free to contract for less if they see proper, but undertakes to prescribe one absolute, invariable charge for all sales of real estate. In this respect it resembles an act prescribing the fees of public officers, for official services compulsorily rendered, and which, as a matter of sound public policy, are not permitted to become the subject of special contract. [19 App. D.C. at page 75]

In *Coughlin v. District of Columbia*, 25 App. D. C. 251 (1905), a Joint Resolution of Congress of February 26, 1892, 27 Stat. 394, empowered the Commissioners of the District "to make and enforce all such reasonable and usual police regulations in addition to those already made under the act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia. . . ." This was held not to justify a regulation promulgated by the Commissioners (the regulation was stated to have been copied from an old municipal ordinance of the City of Washington) requiring the owners or occupants of buildings or land fronting upon a paved sidewalk in the District to remove snow and ice therefrom. This court said:

... it is regulation, not legislation, that is authorized; the reasonable regulation of the exercise of right, not the imposition of a duty; the usual police regulation for the maintenance of public order, not the levying of a tax either in the way of enforced labor or in the way of purchase of materials for sprinkling the sidewalks. Whatever power the legislature itself may have in the premises, certainly it is not to be presumed to have granted such plenary authority as is here claimed under the joint resolution of 1892.

That various municipalities may have exercised such power, as appears from various municipal ordinances collated in the brief on behalf of the appellee, is not to the point. Municipalities are usually vested with quasi legislative powers, among them the sovereign power of taxation and assessment, and from the fact that municipal ordinances are elsewhere to be found, analogous to the so-called regulation here in question, it is not to be inferred that similar powers exist in the commissioners of the District of Columbia. The commissioners are not the municipality, but only the executive organs of it; and Congress has reserved to itself, not only the power of legislation in the strict sense of the term, which it cannot constitutionally delegate to anyone or to any body of men, but even the power of enacting municipal ordinances, such as are within the ordinary scope of the authority of incorporated municipalities. It has delegated to the commissioners simply the power of making 'police regulations,' and only such police regulations as are usual and commonly known by that designation. [25 App. D.C. at pages 254-255]

The decision was in part rested upon the ground that the Congress, on three occasions, had itself expressly legislated, although ineffectually, on the precise subject of the questioned regulation. That, the court said, was sufficient to show that the Congress had reserved this subject for itself and did not confer upon the Commissioners the power to regulate it. The court said:

Instead of an application to Congress there has been this ill-advised resurrection of an old municipal ordinance, and the promulgation of it by the commissioners as a regulation of their own, intended to effect what three several acts of Congress had failed to effect. We cannot but regard it as a plain usurpation of the powers of Congress. [25 App. D.C. at page 257]

In *United States ex rel. Daly v. MacFarland*, 28 App. D.C. 552 (1907), it appeared that under an Act of April 23, 1892, 27 Stat. 21, and an Act of March 3, 1893, 27 Stat. 537, the Congress had extended to the Commissioners of the District power to make plumbing regulations, and had provided that violation of such regulations should be punishable by fine or, in default of payment thereof, by imprisonment. The Commissioners promulgated regulations, but included therein an additional penalty for violation, to wit, the revocation of a plumber's license. Act.

ing under the regulations thus promulgated, the Commissioners forfeited a license. In a mandamus proceeding to compel restoration of the same, this court held that it was not within the power of the Commissioners to provide the additional penalty. The court said:

It is well settled that the District of Columbia has no legislative power, it being merely a municipal corporation bearing the same relation to Congress that a city does to the legislature of the State in which it is incorporated. [Citing authorities]

The next proposition is equally established, namely, that 'a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' Dill. Mun. Corp. 4th ed. Sec. 89.

* * * *

The constitutional guaranties of the liberty and property of the individual undoubtedly include and protect him in the exercise of his right to earn his living by following a lawful calling, and this right is subject only to reasonable control. That such a license as was revoked in this case is a species of property goes without saying. The right to forfeit this property by the revocation of the license must clearly appear, or it must be held not to exist. Judge Dillon says (sec. 345):

'A corporation, under a general power to make by-laws, cannot make a by-law ordaining a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly* conferred by the legislature.'

Certainly such power will not be presumed to exist in statutes in restraint of the ordinary and legitimate avocations of life, avocations in which the mass of human toilers gain their livelihood and contribute to the welfare and happiness of society. In *Greater New York Athletic Club v. Wurster*, supra, the court held that a grant of power to abridge and curtail the exercise of the right of the individual to engage in or pursue a business or calling lawful in itself can only be justified and sustained on the theory that the exercise of such power is necessary to the public welfare and safety, and such power cannot be presumed, but must be clearly expressed. [28 App. D.C. at pages 558-562]

In *Johnson v. District of Columbia*, 30 App. D. C. 520 (1905), this court ruled that Sections 1 and 2 of the Act

of August 23, 1871, of the Legislative Assembly, prescribing a jail penalty or fine, or both, for cruelty to animals were mere police regulation. The court said:

We think it clear that the two sections of the Act above referred to . . . are mere police regulation, and therefore within the scope of powers delegated to the municipality by Congress. *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Smith v. Olcott*, 19 App. D. C. 61. Cruel treatment of helpless animals at once arouses the sympathy and indignation of every person possessed of human instincts,—sympathy for the helpless creature abused, and indignation towards the perpetrator of the act; and in a city, where such treatment would be witnessed by many, legislation like that in question is in the interest of peace and order and conduces to the morals and general welfare of the community. 'Laws for the prevention of cruelty to animals may well be regarded as an exercise of such police powers. That good government calls for the condemnation of such acts as are prohibited by the ordinance ought not to be questioned. The subject is pre-eminently one for local municipal regulation.' *St. Louis v. Schoenbusch*, 95 Mo. 418, 8 S.W. 791. [30 App. D.C. at page 522]

In *United States v. Cella*, 37 App. D. C. 433 (1911), there was involved an indictment charging violation of an Act of March 1, 1909, 35 Stat. 670, which prohibited bucketing and bucket shopping and abolished bucket shops. The prosecution was in the name of the United States. It was contended by the defendant that it should have been in the name of the District of Columbia, this in view of Section 932 of Chapter 20 of the Code, 31 Stat. 1340, relating to criminal procedure and providing that:

Prosecutions for violation of all police or municipal ordinances or regulations, and for violation of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the city solicitor or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

The decision of this court turned upon the question whether or not the bucket shop act was a police or municipi-

pal ordinance or regulation or a penal statute in the nature of a police or municipal regulation, or whether it created and denounced a general offense. In holding that it did the latter; the court said:

We have said in the prior case that there can be no crimes against the District of Columbia, the District not being a sovereignty; that crimes committed here are crimes against the United States. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 9. Congress, in the exercise of its plenary power, has prescribed the procedure to be followed in the prosecution of offenses in the District. It has ordained that prosecutions for violations of all police or municipal ordinances or regulations, and penal statutes 'in the nature of police or municipal regulations,' shall be in the name of the District. It is at once apparent, therefore, that the point raised by appellees is purely technical in character, as no substantial right is involved.

Looking to the context, and having in mind the probable intent of Congress, what is the scope of the words 'penal statutes in the nature of police or municipal regulations,' as used in the statute under consideration? A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character. While municipal ordinances or police regulations are binding upon the community affected by them, they do not emanate from the supreme power of the state, which is the exclusive source of all general legislation. *Baldwin v. Philadelphia*, 99 Pa. 170; *Rutherford v. Swink*, 96 Tenn. 564, 35 S. W. 554. When, therefore, Congress required prosecutions for violations of statutes in the nature of police or municipal regulations to be in the name of the District of Columbia, it undoubtedly had in mind such local regulations as were peculiarly applicable to conditions here existing. It did not, we think, intend to require or permit prosecutions under general penal statutes to be in the name of the District of Columbia, even though the territorial scope of such statutes was restricted to the District. A statute making it an offense for a motor vehicle to exceed a certain limit of speed within the city limits would clearly be a penal statute in the nature of a police regulation. Such a statute would be designed to regulate the speed of motor vehicles in accordance with the requirements of local conditions. The bucket shop statute under consideration, however, is of a different character. We find that statute in the chapter of the Code devoted to crimes and punishments, and in a sub-chapter governing offenses against public policy. The commission of the offense would be as much against public policy in one place as in another; in other words, while the statute is local in its application, it deals with a subject-matter general in character. Admittedly,

a prosecution for a second offense under the act must be in the name of the United States, since the punishment for such an offense may be imprisonment for five years. No reason is apparent why a prosecution for a first offense should not also be in the name of the United States. Moreover this statute does not purport to regulate the business of bucketing, but, on the contrary, is designed absolutely to prohibit it. While the authority to enact such a statute may be ascribed to the police power, as indeed may be the authority to enact all criminal statutes, we think, nevertheless, that the act is something more than one in the nature of a police or municipal regulation; that it creates and denounces a general offense, and hence that prosecution thereunder was rightly commenced in the name of the United States. [37 App. D.C. at pages 435-436]

It is correctly suggested in *Roach v. Van Riswick*, that, for lack of a precise criterion, the determination of what powers are strictly "municipal" and may therefore rightly be conferred upon local corporations, and what powers are properly "legislative" and cannot therefore be delegated, is not always without difficulty. But we think that the constitutional provisions and principles and the rulings and reasoning above reviewed—which for this court are authoritative—clearly require the conclusion that the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of "general legislation," the power to enact which the Congress could not constitutionally, and did not, delegate to the Legislative Assembly.

In requiring restaurant keepers, upon pain of fine and license forfeiture, to serve any respectable, well-behaved person without regard to race, color, or previous condition of servitude, the enactments limit the freedom of the restaurant keeper in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling. Before the enactments, he could choose customers according to his own business or personal desire. The enactments lift restaurant keeping, theretofore strictly a private enterprise, to the level of a "public employment"—thereby altering the common law, which re-

quired inns, but not restaurants, to serve all travellers. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S.E. 2d 906 (1946); *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773 (1944); Beale, INNKEEPERS AND HOTELS, 1906, §§15, 35, 53, 61, 301; Williston, CONTRACTS (Rev. Ed. v. 4, §1066, pp. 2964, 2965); 43 C.J.S. INNKEEPERS, §2, p. 1136.⁴ The enactments do not relate, in the usual sense

⁴ In *Alpaugh v. Wolverton* the plaintiff Alpaugh's notice of motion for judgment alleged in a first count that the defendant Wolverton, as the owner and operator of a hotel and restaurant, had unlawfully refused restaurant service to the plaintiff on named days of the week on which the defendant had agreed to serve members of a Chamber of Commerce, including the plaintiff; and alleged in a second count that the defendant had unlawfully refused restaurant service to the plaintiff on named days of the week on which the defendant had agreed to serve members of a Kiwanis Club, including the plaintiff. The Circuit Court, Prince William County, sustained a demurrer which challenged the sufficiency of the notice of motion. That ruling was affirmed by the Supreme Court of Appeals of Virginia. That court recognized that the proprietor of a hotel may be an "innkeeper" as to some of his patrons and a "boardinghouse keeper" as to others. The court ruled:

"Once the technical relation of innkeeper or hotelkeeper and guest has been established, the parties become subject to the duties, responsibilities and liabilities which attach to the relationship. Because of the *quasi* public nature of his business, the innkeeper must furnish proper accommodations in the way of lodging, food, etc., so far as they are available (43 C.J.S., Innkeepers, section 9, p. 1149). He becomes 'practically an insurer of the safety of property intrusted to his care' by the guest (28 Am. Jur., Innkeepers, section 67, p. 585), and he incurs other responsibilities which need not be detailed here. In return, he has a lien on the property of his guest for the reasonable charges of such keep and entertainment, both at common law (28 Am. Jur., Innkeepers, section 123, p. 624) and under our statute (Code, section 6444).

"A restaurant, on the other hand, is an establishment where meals and refreshments are served. 28 Am. Jur., Innkeepers, section 10, p. 545; 43 C.J.S., Innkeepers, section 1, b, p. 1132.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 Am. Jur., Innkeepers, section 120, p. 623; 43 C.J.S., Innkeepers, section 20, b, p. 1169. His rights and responsibilities are more like those of a shopkeeper. *Davidson v.*

of the terms, "to the promotion or protection of the public morals and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health" which are the ordinary subjects of municipal regulation.⁵ Moreover, the essential object of the enactments was to prevent in restaurants—and in the other businesses enumerated—discrimination on account of race, color, or previous condition of servitude, notwithstanding that such discrimination was customary in the District of Columbia at the time the enactments were promulgated.⁶ The enactments are in the nature of civil rights legislation. They undertake to establish in the restaurant business, and in the other businesses

Chinese Republic Restaurant Co., 201 Mich. 389, 167 N. W. 967, 969, L.R.A. 1918 E, 704. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance v. Mayflower Tavern*, (Utah), 150 P. 2d 773; 776; *Noble v. Higgins*, 95 Misc. 328; 158 N.Y.S. 867, 868." [184 Va. at pages 947-948, 36 S.E. 2d at page 908]

⁵ The quoted language is from McQuillin, *MUNICIPAL CORPORATIONS*, 3rd ed., v. 7, §24.198, p. 15.

⁶ Of such a historical fact the court may properly take judicial notice. Cf. *Blake v. United States*, 103 U.S. 227, 235 (1880); *Commonwealth ex rel. John Ferguson v. Ball*, 277 Pa. 301, 306, 121 Atl. 191, 192, 29 A.L.R. 626, 629 (1923). See *Stultz v. Cousins*, 242 Fed. 794, 798 (6th Cir. 1917). 9 Wigmore, *Evidence*, 3d ed. (1940), 571; 20 Am. Jur. 82.

It is such common historical knowledge that there was general discrimination on account of color at the time the enactments in question in the instant case were passed that citation of historical authorities on the subject is superfluous. But see: Speeches of Senator Charles Sumner of Massachusetts, Cong. Globe, 42nd Cong., 2nd Sess. 381-389, 429-435 (1871-1872). In reference to the District of Columbia itself see: W. B. Bryan, *A History of the National Capitol*, vol. II (N. Y., 1916), 529-531; Edward Ingle, *The Negro in the District of Columbia* (Baltimore, 1893), 57; Washington, D. C. Evening Star, Jan. 9, 1872, p. 4, col. 1.

named, a policy of equal service without respect to race or color, and to enforce that policy by a fine and license forfeiture. Finally, the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's capital, of national interest. In view of the purpose and effect of the enactments as above described, we think that no other conclusion can reasonably be reached than that they were of the character of general legislation, the power to enact which the Congress could not constitutionally delegate to the Assembly.

We think also that in the Act of February 21, 1871, creating the District government and the Legislative Assembly, the Congress did not attempt to endow the Assembly with power to enact such measures as are the subject of the instant appeals. The Congress made no express grant of power to the Assembly to enact such measures, and in our view such power is not fairly or necessarily to be inferred from the powers granted in the Act, and the power to enact such measures was not indispensable to the carrying out of the corporate objects of the District of Columbia as those objects appear from the Act.

We are referred to the so-called "Jim Crow Cases": *Boyer v. Garrett*, 183 F. 2d 582 (4th Cir. 1950); *Bunn v. City of Atlanta*, 67 Ga. 147 19 S. E. (2d) 553 (1942); *Housing Authority v. Higginbotham* (Tex. Civ. App.) 143 S. W. (2d) 95 (1940); *Hopkins v. City of Richmond*, 117 Va. 629, 86 S. E. 139 (1915) overruled on constitutional grounds, other than delegability, in *Irvine v. City of Clifton Forge*, 124 Va. 781, 97 S. E. 310 (1918); *Patterson v. Taylor*, 51 Fla. 275, 40 So. 493 (1906); *Croonis v. Schad*, 51 Fla. 168, 40 So. 497 (1906); *Mayo v. James*, 12 Grat-tan's Reps. 17 (Va.) (1855); *Roberts v. Boston*, 5 Cush. (Mass.) 198 (1849). Those cases uphold as within the bounds of municipal power ordinances requiring segregation of the white and colored races: For example, in *Patterson v. Taylor*, an ordinance requiring separate ac-

commodation for, and the separation of white and colored passengers on, streetcars; in *Hopkins v. City of Richmond*, ordinances requiring residential segregation for members of the white and colored races; in *Boyer v. Garrett*, an ordinance for the segregation of races in athletic activities in public parks and playgrounds. We think such cases distinguishable from the instant case because in such cases the ordinances were in accord with a local custom of racial segregation on account of color and were held valid upon the theory that they were for the purpose of preserving peace and good order which would likely be interfered with by racial association. Ordinances in aid of the preservation of peace and order are indisputably within municipal power. The enactments involved in the instant case were in conflict with local custom in respect of race association and cannot therefore be justified as in aid of the preservation of peace and order. Moreover the cases cited are not authoritative in this jurisdiction.

The brief for the District of Columbia refers to certain Acts of Congress and to certain enactments of various municipal authorities in the District of Columbia prior to the Legislative Assembly enactments of 1872 and 1873 which are in question in the instant case. We describe in the margin the prior Acts and enactments referred to.⁷ The District contends that they evidence

⁷ The Act of Congress of May 3, 1802, vesting the first government of the City of Washington with authority to regulate liquor dealers and to restrain and prohibit gambling.

The enactment of December 15, 1810, of the 9th Council of the City of Washington, prohibiting the keepers of ordinaries and taverns from selling spirituous liquors to any slave or other person of color on Sundays after 9:00 o'clock in the forenoon.

The Act of Congress of May 15, 1820, authorizing the City of Washington to regulate taverns, ordinaries and tippling houses and re-enacting the authorization of May 3, 1802, to restrain and prohibit gambling.

The Act of Congress of May 17, 1848, continuing in force for a period of 20 years, or until Congress should by law determine otherwise, the Act of Congress of May 15, 1820, and the Act of

that the Congress regarded such enactments of the municipal authorities, including the enactment of March 7,

Congress of May 26, 1824, incorporating the inhabitants of the City of Washington, and certain Acts supplemental or additional to such Acts.

The enactment of June 3, 1853, of the 50th Council of the City of Washington, prohibiting keepers of ordinaries or taverns from selling spirituous liquors to any slave or other person of color on any day between sunset and sunrise, and prohibiting such keepers from selling any spirituous liquors on Sunday.

The Act of Congress of June 12, 1860, reorganizing the government of the County of Washington and authorizing the Levy Court to license taverns and hotels in that part of the District beyond the city limits.

The enactment of October 31, 1864, of the 62nd Council of the City of Washington, prohibiting keepers of hotels, taverns, ordinaries and restaurants from selling spirituous and fermented liquors to any minor and from selling any kind of liquors on Sunday.

The enactment of June 10, 1869, of the 66th Council of the City of Washington, making it unlawful for any person licensed for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment or for conducting a place of public amusement of any kind, to make any distinction on account of race or color as regards admission, provided that any person applying should pay the regular prices and conduct himself in an orderly and peaceful manner.

The enactment of March 7, 1870, of the 67th Council of the City of Washington, making it unlawful for the keepers of any licensed hotel, tavern, restaurant, ordinary, sample room, tipling house, saloon, or eating house to refuse to admit, entertain and supply any quiet and orderly person or to exclude any person on account of race or color.

The Act of Congress of February 21, 1871, creating the Legislative Assembly and providing that all laws and ordinances of the cities of Washington and Georgetown, whose charters were repealed, and of the Levy Court, which was abolished, not inconsistent with the Act itself, should remain in full force until modified or repealed by Congress or the Legislative Assembly.

The enactment of August 23, 1871 of the Legislative Assembly requiring the proprietors of restaurants and eating houses to pay an annual tax and providing that every place, the business of which is to provide meals and refreshments for casual visitors, should be regarded as a restaurant or eating house, and further providing that all laws and ordinances of the corporations of Washington and Georgetown, and of the Levy Court, promulgating police regulations for the several businesses of the citizens of the District should be continued in force.

1870 of the 67th Council of the City of Washington—which the enactments of 1872 and 1873 of the Legislative Assembly substantially paralleled—as within the proper power of the municipal authorities. We think this contention not correct, especially in view of the fact that in Section 1 of the Act of February 21, 1871, creating the District Government and the Legislative Assembly, the Congress provided that the District Government should, *inter alia*, “exercise all other powers of a municipal corporation *not inconsistent with the Constitution and laws of the United States and the provisions of this Act.*” (Emphasis supplied.) But assuming that the Congress did regard the municipal enactments in question as within municipal power, that is not decisive of the question as to their validity. That question must be determined by the courts. We are referred to no judicial decision upholding, as within the power of the municipal authorities of the District, the enactments referred to.

II.

The conclusion reached in the previous topic that the enactments of the Legislative Assembly of 1872 and 1873 are of the character of general legislation requires the further conclusion that they were repealed by the District of Columbia Code of 1901, Act of March 3, 1901, 31 Stat. 1189. Section 1 of that Code provided that:

The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

That section did not expressly preserve enactments of the Legislative Assembly. Such enactments were, however, dealt with by § 1636 of the Code which provided:

All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except: * * *

That was an express repeal of all enactments of the Legislative Assembly not saved from repeal by eight exceptions which were expressly set forth in the Section. The only exceptions pertinent to the present inquiry are the Third and the Fifth. The Third exception named:

Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

That exception did not save the Assembly enactments of 1872 and 1873 for the reason that those enactments, as we have demonstrated in the previous topic, were not acts in the nature of police regulations, or acts relating to municipal affairs only; and those enactments obviously are not within the other acts and parts of acts mentioned in the Third exception. The Fifth exception saved from repeal:

All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

As indicated at the outset of this opinion, the enactments of the Assembly of 1872 and 1873 provide that upon conviction of the offenses defined a restaurant keeper shall be fined one hundred dollars and also forfeit his license. If the forfeiture provisions are in the nature of a penalty rather than being merely remedial, then the enactments were not saved by the Fifth exception because they were not within the class of penal statutes which that Section expressly saved. We think it clear that the license forfeiture provisions of the enactments of 1872 and 1873 are in the nature of penalties. The 1872 enactment makes

violation a misdemeanor; the 1873 enactment provides for enforcement by information filed in the Police Court of the District of Columbia, subject to appeal to the Criminal Court of the District in the same manner as provided for the enforcement "of the District fines and penalties under ordinances and law." The license forfeiture provisions are an integral part of those sanctions.

III.

According to the "Agreed Statement of Facts" filed in the Municipal Court in the instant case:

There is no official record of any attempted prosecutions for violations of the terms of the Legislative Assembly Act of June 20, 1872; . . . upon information and belief there were four such prosecutions, all resulting in convictions in the Police Court but all being reversed in the Supreme Court of the District of Columbia, holding criminal court, or resulted in *nolle pros*; all four such prosecutions were in the year 1872 and there have been no further attempted prosecutions under the 1872 Act since that year.

. . . [T]here is no official record of any attempted prosecutions under the terms of the Legislative Act of June 26, 1873, and, so far as can be learned, there was never an attempt of prosecution under that Act.

The 1873 enactment required, in addition to the serving of any well-behaved and respectable person, the transmission to the "Register of said District" of "a printed copy of the usual or common price or prices of articles or things kept for sale by him . . . which shall be filed by the Register . . . and in a failure of any proprietor . . . to transmit the copy aforesaid, the said Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him." According to the "Agreed Statement of Facts":

. . . the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the Assessor [sic] for the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale, as required by the Act of June 26, 1873, and, so far as is known, no demands

were ever made upon local restaurants so to file by the Assessor [sic] or other municipal officer.

The Thompson Company asserts that the failure of the municipal authorities to enforce the Assembly enactments of 1872 and 1873 constitutes an administrative interpretation that the enactments were not in force and effect, and urges that the enactments have been repealed by this "long course of administrative interpretation or by obsolescence."

In view of the conclusion we reach in Topics I and II of this opinion—that the enactments were not within the power of the Assembly and that they were repealed by the 1901 Code, we think it not necessary to rule upon these additional contentions. But we think it appropriate to comment, in this connection, that the enactments having lain unenforced for 78 years, in the face of a custom of race disassociation in the District, the decision of the municipal authorities to enforce them now, by the prosecution of the instant case, was, in effect, a decision legislative in character. That is to say, it was a determination that the enactments reflect a social policy which is now correct, although it was not correct—else the enactments would have been enforced—heretofore. Such a decision were better left, we think, to the Congress. And in ruling that the enactments of 1872 and 1873 cannot, because not within the power of the Assembly, and because repealed, support the present prosecution, this court rules upon the question of their validity alone and not upon the question of the wisdom of the policy which they reflect. That question is not within the proper province of either the municipal authorities or the courts; it is for Congressional determination.

In accordance with the conclusions we reach that the enactments in question in the instant case were not within the power of the Legislative Assembly and that they were repealed, and in view of Circuit Judge Prettyman's view expressed in his separate opinion that if the enactments

were general legislation they were invalid when enacted and were repealed, that if they were municipal ordinances regulatory of licensed businesses they are now unenforceable;

The judgment of the Municipal Court of Appeals as to the first count of the information is affirmed, and as to the second, third and fourth counts of the information is reversed.

PRETTYMAN, *Circuit Judge*, concurring in the judgment announced by Chief Judge Stephens: The question upon these appeals is whether an information charging the restaurant owner, Thompson Company, Inc., with violation of certain 1872 and 1873 acts of the Legislative Assembly can validly be prosecuted. The nature of those enactments constitutes the initial premise from which any course of reasoning toward a conclusion must proceed. There are two possible views. Either they were general legislation, *e.g.*, relating to civil rights, use of property, validity of contracts, or similar subjects; or they were municipal ordinances regulatory of licensed businesses. It is my opinion that upon proper reasoning from either view the conclusion is reached that the enactments are presently unenforceable.

The judges who join Chief Judge Stephens take the former view. There are reasons, which he describes, which support that view. From that premise I think the next steps in his opinion follow inevitably. If the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond the power permitted a municipal body in the District of Columbia by the Constitution; and, furthermore, even if valid when enacted they were repealed by the express provision of the 1901 Code.

The judges who join Judge Fahy take the other view of the nature of the enactments. They would hold that the enactments are regulatory municipal ordinances. There are reasons, which Judge Fahy describes, which

support that view. But it seems to me that, if that premise be adopted, the same ultimate conclusion, that the enactments are presently unenforceable, must follow.

We must keep in mind that when we consider the enactments from this latter viewpoint we are considering acts of a municipal authority, not acts of Congress; regulatory ordinances, not statutes; acts of an official body having power to repeal or abandon these regulations, not of a body without such power. It seems to me that a regulatory condition imposed upon a business license, originally prescribed by a municipal licensing authority in 1872 and 1873 but neither mentioned again nor enforced for a period of 75 years, despite the interim promulgation of apparently complete regulations and the issuance of thousands of licenses during that period, must be deemed by the courts to have been abandoned by the licensing authority.

No prosecution under these enactments has been attempted since 1872. No mention of them has been made by any official since 1873. No official text or record of their passage exists; the text and record with which we are dealing being gleaned from unofficial compilations, newspapers, and such.* Congress has passed licensing acts

* After these cases were decided, on January 22, 1953, and the opinions promulgated, the Corporation Counsel for the District of Columbia advised the court that the signed originals of these enactments had been discovered since the argument and are in the possession of the Commissioners of the District in a bound volume. He states that this volume was recently discovered in a storage room in the basement of the District Building, which is the official home of the District Government. He has exhibited these originals to the court and to counsel in the cases. Prior to the discovery of the original documents the text of the enactments was found in Abert and Lovejoy's *Compiled Statutes* (1894) (see D. C. CODE X (1951)) and in the *District of Columbia Laws* published by authority of Edwin L. Stanton, Secretary of the District of Columbia. The existence of the enactments and their text having been conceded by all parties, and the cases having been decided upon that basis, the discovery of the originals does not affect the gist of the opinions.

several times since 1873, general acts in 1902¹ and 1932,² and an act giving the Commissioners power to prescribe regulations for the sale of alcoholic beverages, an important part of many restaurant businesses, under licenses.³ The latter contained many regulatory provisions and authorized the Commissioners to prescribe others. The enactments of 1872 and 1873 applied to barrooms as well as to restaurants. Extended regulations for the operation of restaurants have been promulgated at least once by the Commissioners; in 1942 the Commissioners published an order which began: "That for the purpose of regulating the establishment, maintenance and operation of restaurants, delicatessens and catering establishments in the District of Columbia, the following regulations are hereby adopted: . . ." In none of the statutes or regulations adopted since 1873 have the regulations with which we are here concerned been mentioned or referred to. In fact the existence of any such regulation was unknown to the licensing authorities for many years, probably half a century. In all this period of time restaurants in this jurisdiction have exercised a power to select their customers. A rapidly increasing number have served all well-behaved persons, but it is not represented to us that any of them thought this policy obligatory. Many have limited their clientele.

I am fully aware of the principle, often stated, that a statute is not repealed by disuse and also that the doctrine of desuetude, recognized and applied in the Scottish law, had no place in the English common law.⁴ But that

¹ Act of July 1, 1902, 32 STAT. 622; as to "victualers . . . or eating houses, by whatsoever name designated," see 32 STAT. 625, D. C. CODE § 20-887 (1929).

² Act of July 1, 1932, 47 STAT. 550; as to restaurants see 47 STAT. 554, D. C. CODE § 47-2327 (1940); as to regulations see 47 STAT. 563, D. C. CODE § 47-2345 (1940).

³ Act of Jan. 24, 1934, 48 STAT. 322, D. C. CODE § 25-107 (1940).

⁴ Philip, *Some Reflections on Desuetude*, 43 JURID. REV. 260 (1931).

principle (that a statute lives in full force despite non-use) rests upon the proposition that the executive branch of government cannot nullify an act of the legislative branch by failure to enforce, any more than it can effect a repeal by direct fiat. Our present consideration does not involve that proposition. Since 1878 the Board of Commissioners has been the governing body of the District of Columbia,⁵ which is a municipal corporation.⁶ They have had the power both to make and to enforce municipal regulations and generally to exercise all the usual powers of a municipal corporation.⁷ Theirs have been the powers of local ordinance-making and of law enforcement.¹⁰ They could repeal what they could enact. Thus the failure to restate and to enforce the 1872-73 conditions was by an official body which had power to do just that. Executive disuse of a legislative enactment is not involved. What is involved is disuse by a licensing authority of its own regulations.

If a municipal licensing authority should say, "Hereafter operations of licensed restaurants shall be subject to the following regulations: (a), (b), (c) and (d)," and a few years later should say, "Hereafter operations of licensed restaurants shall be subject to the following regulations: (a), (b) and (c)," no one would contend, I should think, that a restaurant operator could be prose-

⁵ 20 STAT. 103 (1878), as amended, D. C. CODE § 1-201 (1951).

⁶ Rev. Stat. D. C. § 2 (1874), 18 STAT. part 2, § 2, D. C. CODE § 1-102 (1951).

⁷ 27 STAT. 394 (1892), D. C. CODE § 1-226 (1951). Since 1902 they have had specific power to require licenses for businesses or callings. 32 STAT. 622 (1902), as amended, D. C. CODE § 47-2344 (1951).

⁸ Rev. Stat. D. C. § 3 (1874), 18 STAT. part 2, § 3, 18 STAT. 116 (1874), 20 STAT. 103 (1878), D. C. CODE § 1-218 (1951).

⁹ *Supra* note 6.

¹⁰ *Railroad Co. v. District of Columbia*, 10 App. D.C. 111, 125 (1897).

cuted for failure to observe regulation (d) after the latter announcement. It seems to me that regulation (d) would be deemed by the courts to have been abandoned for the later period. It makes no difference whether the result be labeled abandonment, desuetude, repeal by implication, or whatsoever. Quite the contrary, if regulation (d) had been imposed by Congress, it would remain enforceable until repealed by Congress, whether the municipal licensing authority ever mentioned it or not. The point is that a municipal body can abandon its own once-announced regulations, but it cannot nullify an act of its superior legislature.

Although irrelevant to the issue at hand, before leaving this phase of the discussion I note that the principle of non-repeal of statutes by disuse has some exceptions. For example, see the opinion of Chief Justice Tilghman of the Supreme Court of Pennsylvania in *Wright v. Crane*;¹¹ and the opinion of that court in *Porter's Appeals*;¹² and the English cases cited by Chancellor Bland of Maryland in *Snowden v. Snowden*;¹³ and the long, vigorous opinion of the Supreme Court of Iowa in *Hill v. Smith, et al.*;¹⁴ and the long discussion, in which the Supreme Court of Pennsylvania held the ducking stool to be no longer an available means of punishment, in *James v. The Commonwealth*;¹⁵ and the implication in the observation of this court in 1902 that "we cannot regard any act of Congress as obsolete which has been enacted as late as 1874."¹⁶ There are, of course, many other cases to the contrary, and in some of these same jurisdictions, but the discussions above cited show that courts have sometimes refused to apply long-disused statutes even though they were unrepealed acts of the legislature.

¹¹ 13 S. & R. 446, 452 (1825).

¹² 30 Pa. 496, 499 (1858).

¹³ 1 Bland. 550, 555 (1829).

¹⁴ 1 Iowa 95 (1840).

¹⁵ 12 S. & R. 220 (1824).

¹⁶ *Costello v. Palmer*, 20 App. D.C. 210, 220.

These 1872-73 enactments were not quiescent provisions applicable once in a while to some peculiar occasion. The licensing authorities have issued hundreds of licenses to restaurants every year for these 75 years, and except for the period of prohibition also to liquor dispensers. They must have purported to advise the licensees, and the licensees must have understood or thought they understood, the conditions upon which they were to conduct their licensed businesses. As each business license has been issued over all these years, these regulations have been ignored. Moreover, these were regulations which would have governed the daily conduct of every licensee. If they were applicable at all, they were applicable constantly to many businesses. Thus the failure to apply them has been active, affirmative, constant and consistent.

Consider the provision, included in these enactments, that the proprietor of a soda fountain must transmit to the Assessor (or Register) of the District a printed copy of the usual prices of articles kept for sale. The regulatory authority in 1873 announced that failure to abide that requirement would result in the forfeiture of the license for a period of not less than one year. The records fail to show that any copy of a sales price was ever filed with the Assessor. They fail to show that any demand for filing was ever made upon any licensee by any municipal authority. It is not conceivable to me that the District authorities could now successfully prosecute criminally a soda fountain operator for failing to file his prices with the Assessor. It is not enough for us, a court, to say that we deem the service provisions desirable and the filing provisions inconsequential, however true that may be. Our question is not one of policy. It is a naked question of law: Is the regulation presently enforceable? It relates to the regulation as a regulation, not merely to parts we may select as desirable.

I think a court would not enforce a condition which was imposed upon a business licensee secretly by the licensing

authority and not revealed either to the public or to the licensee. We would surely hold such procedure not to be due process of law. The case before us is not essentially different, and in some respects is stronger, from the standpoint of the licensee. The condition here involved was not only not revealed by the licensing authority when the license was issued but was not at that time intended to be imposed upon this license; indeed, as I have noted, the licensing authority was not then even aware of such a condition. The circuitous revival of long-dead conditions, after this license was outstanding, was as unjustifiable as a secret adoption of the condition would have been. The due process of law problem which would be raised by an affirmative executive attempt to impose conditions upon established businesses and properties is not presented upon this record, but it hovers in the background.

I do not attempt to draw the line at which, or to depict the circumstances under which, a regulatory condition announced once by a municipal licensing authority and thereafter totally ignored by it, in issuing both regulations and licenses, and in enforcing regulatory measures, becomes ineffective. There must be some time and some circumstance under which continued non-mention of a municipal regulatory condition prevents the licensing authority from enforcing forfeiture of a license for failure to observe that condition. Here we have seventy-five years of disuse in the face of several enactments of licensing acts by Congress, promulgation of extensive regulations by the municipal authorities, issuance of thousands of licenses, and the daily conduct of many licensed businesses. If there be such a thing as a combination of time and circumstances which spell the abandonment of a regulation by the municipal authority which once promulgated it, this is it.

What is said about forfeiture applies to criminal prosecution. Both provisions are in the same sentence of the same enactment. The forfeiture follows automatically a

conviction for the criminal offense. And what applies to filing price lists applies also to the provision, in the same enactments, for service to all well-behaved persons.

If the regulation before us were one of any of the government administrative agencies and all the circumstances were the same as those shown in the present case, we would not hesitate, I think, to hold that a criminal proceeding would not lie.

Citing other cases and quoting from one, the Supreme Court, in *Lanzetta v. New Jersey*,¹⁷ phrased, unanimously, an established rule: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." The Court there held invalid a statute as vague, uncertain and indefinite. *A fortiori* a penal provision unknown to either government authority or licensee is not enforceable.

One of Bentham's observations is very apt:

"We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."¹⁸

I think it not amiss to test our thought by assuming a reverse content in the enactments. Suppose they had required segregation in restaurants, that they were so-called "Jim Crow" ordinances such as seem to have existed in some cities. Suppose that since their enactment in 1873 they had never been applied or even mentioned, and that since that date all restaurants had served whom they pleased and many pleased to serve all well-behaved persons. Suppose that the municipal authorities in 1950 suddenly charged one such restaurant with violating the

¹⁷ 306 U.S. 451, 453, 83 L.Ed. 888, 59 S.Ct. 618 (1939).

¹⁸ 5 BENTHAM, WORKS 547 (1843)..

old ordinance, and subjected the licensee to a criminal proceeding which would result also in a forfeiture of license. Would this court hold the forgotten regulation applicable? I am certain it would not. And the legal question in that situation would be the same as that now before us. We are not to determine what the law ought to be. That is for the Congress, not for the courts. It is not for this or any other court, however strong and clear its opinion on the subject may be, to determine what the law ought to be concerning service to customers in licensed restaurants. The judicial branch of government cannot impose either segregation or non-segregation upon licensed restaurants. The only question presented by the present case within the scope of judicial power is the simple question whether these 1872-73 enactments of the Legislative Assembly are presently enforceable against this appellant in a criminal proceeding with its mandatory license forfeiture upon conviction. That question would be the same, I suggest, if the content of the enactments were the reverse of their actual content. The answer ought to be the same.

Avoiding the dilemma in which I find the case, the dissenting judges cast the 1872-73 enactments outside the area of either legislation or license condition, a little of each but wholly neither. But their position in that regard seems to me most insecure. They say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone. So solution of the problem whether the enactments of 1872-73 were legislation in a general sense or were municipal regulatory ordinances is not advanced in the least by saying that the Assembly was a "legislative" body. Second, the dissenting judges say the 1872-73 enactments

were not conditions imposed upon licensed businesses. They liken those enactments to municipal ordinances such as the off-roof snow removal regulation, the fireproof drapery regulation, and other regulations of that sort. Those, they say, apply to licensed businesses but are not conditions upon the licensés; they are merely regulatory requirements. The first regulation they mention, the snow removal one,¹⁹ begins "No person shall throw", etc. It covers "any street, avenue", etc., and "coal, . . . mud, . . . offal, . . . or any dead animal" as well as snow. The other police regulation to which they refer,²⁰ the fireproof drapery requirement, begins: "That the draperies, and readily combustible decorations of booths and the like to be used in any church", etc. No activity is farther removed from licensing than is the conduct of a church. Those regulations do apply to licensed businesses in the same sense that they apply to all businesses, and all people, and all activities. The off-roof snow requirement applies to every operation, licensed or not, housed in structures from which snow falls off the roofs. The fireproof drapery requirement is imposed upon every entertainment, licensed or not. The same is true of the other regulations the dissenting judges mention, those relating to minimum wages, maximum prices, and child labor. Those regulations are not conditions imposed upon licenses; they are police regulations imposed upon everybody. No forfeiture of license is a prescribed penalty for their violation. But a regulation imposed upon a designated business which is operated under a license, and upon such a business only, for violation of which regulation forfeiture of the license is decreed, is a condition upon operation under the license; call it what we will.

¹⁹ Police Regulations of the District of Columbia, Art. III, § 1 (1944).

²⁰ *Id.*, Art. XVII, § 2.

These enactments of 1872-73, whether they be general legislation or merely municipal ordinances, are clearly conditions imposed upon the conduct of named licensed businesses and upon no other activity or person, and one compulsory penalty for violation is a forfeiture of the license.

One further thought on this phase of the discussion. Even if these enactments were not correctly described as conditions upon operations under certain licenses, but were general regulatory municipal ordinances, it seems to me that they could be abandoned by the municipal authority which had the combined powers to repeal them or to enforce them, and that the sum of the circumstances shown in this case demonstrates effective abandonment.

I concur in the judgment announced by Chief Judge Stephens. But I think it unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances. The same ultimate result—that they are presently unenforceable—follows in either event. If they were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority which originally adopted them. Thus a determination as to which view of the nature of the enactments is correct is immaterial to the controversy before us, which controversy is simply whether Thompson Company can be presently prosecuted for failure to observe them. That being so, I think the court should not attempt to make a firm decision upon the disputed original nature of the enactments. We ought to explore all premises and all courses of reasoning applicable to them, but if they all lead to the same result in the controversy we have to decide, we need not choose one route only. We are well advised not to limit the result we reach to a single premise if in fact we think all admissible premises establish that result. In

such latter event we ought to say just that; we ought not in effect to qualify our conclusion.

I am authorized to state that Circuit Judge Wilbur K. Miller concurs in the opinion of Chief Judge Stephens, but if the view that the enactments are regulatory ordinances were accepted, he agrees with what is said in this opinion.

FAHY, *Circuit Judge*, with whom EDGERTON, BAZELON and WASHINGTON, *Circuit Judges*, concur, dissenting:

In our view the provisions of the 1873 Act requiring the proprietor of a licensed restaurant to serve any well-behaved and respectable person were valid when enacted by the Legislative Assembly, have not been repealed and are in effect.¹ Such problems as may now arise from their enforcement can be met in a reasonable manner without judicial repudiation of regulations legally enacted and never repealed.

I. We first give our reasons for concluding the equal service provisions were valid when enacted.

Art. I, Sec. 8, Cl. 17, of the Constitution confers upon Congress exclusive legislative power over the District of Columbia.² Under this grant subordinate instrumentalities of government have from time to time been created

¹ Since they are in substitution for provisions enacted in 1872, the latter, with regard to restaurants, are repealed. This is adequately explained in the opinion of Judge Clagett in the Municipal Court of Appeals. *District of Columbia v. John R. Thompson Co.*, 81 A. 2d 249, 262 (1951).

² "The Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government * * *"

by Congress. The Legislative Assembly* was one of these, with authority granted by Congress over

“* * * all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act * * * but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.” (Section 18)

There can be no doubt the passage of the equal service provisions was within this grant. They deal with “rightful subjects of legislation”, their scope is “within said District,” they are “consistent with the Constitution of the United States”,—a Constitution framed in the background of the principle that all men are created equal. They have at all times been subject to repeal or modification by Congress.

There can be no question Congress could constitutionally delegate to the Legislative Assembly power to enact regulations of a municipal or local character. No judge of any of the three courts which have considered this case has indicated doubt about this. And the Supreme Court, in *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889), while striking down an attempt by the Legislative Assembly to regulate interstate commerce, said:

“It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. * * *”

* Act of February 21, 1871, 16 Stat. 419/D.C. Code (1951), Historical, p. XLV *et seq.*

If, therefore, enactment of the equal service provisions was "local self-government" they are valid. We think this is the case. They regulate a local activity, the serving of food at a fixed location within the District. This is the sort of thing which in the several states, unless there is state-wide law to the contrary, is appropriately left to municipal authority. This is so not merely because the law applies only to a local area; it is local by other standards as well. Such a regulation is one which the immediate governing body of a municipality, a city council for example, is likely to make its own concern. Higher authority, either a state legislature or, as here, Congress, may legislate upon the subject, but until it does local initiative may deal with it in accordance with the local point of view as to what is conducive to the peace, order, morals, or welfare of the community.

Under this approach it seems plain the equal service provisions must be considered municipal or local. They represent the views of the Legislative Assembly as to how this matter should be regulated within the District of Columbia. They do not affect the general criminal law, or the descent or other disposition of property, or domestic relations, or the law of contracts or of torts, or interstate commerce, or any other matter commonly regulated by general law; but the serving of persons in licensed eating places in the local community. There is no necessity that eating places should be subject to identical regulations in all the cities of any one state. To hold that a municipality is not competent to regulate the subject would create a serious gap in the power of a community to govern itself in a matter of local concern.

Communities vary in outlook and in the same community outlook changes with time and experience. This is as true of segregation as of most subjects. All regulation in this field should not be impossible because the

sort of consensus that leads to state legislation is lacking. We find this view widely held by city governments throughout the country. There are many local ordinances which require segregation on account of race or color and many others which prohibit discrimination on such basis. Birmingham,⁴ San Francisco,⁵ New York City,⁶ Cleveland⁷ and Philadelphia⁸ have ordinances on the subject in respect to housing. Ordinances requiring separation of the races in public transportation are to be found in Birmingham,⁹ Mobile,¹⁰ Atlanta,¹¹ Dallas¹² and Houston.¹³ Fair employment practice ordinances applicable to all employers have been passed by Chicago,¹⁴ Minneapolis,¹⁵

⁴ ORD. No. 709-F, adopted Aug. 9, 1949 (Minute Book A-32).

⁵ File No. 4781 (Series of 1939), approved May 17, 1949.

⁶ Ch. 41, Art. I, § J41-1.2, Administrative Code of the City of New York [1948 Cum. Supp.]; Ch. 15, Title A, § 384-16.0, Administrative Code of the City of New York [1949 Cum. Supp.].

⁷ ORD. No. 2139-49, passed Dec. 19, 1949.

⁸ ORD., Authorizing cooperation among Phila. Housing Authority, City of Phila. and School District of Phila. in construction of low rent homes by the Phila. Housing Authority, § 10, approved May 19, 1950.

⁹ §§ 1002, 1413, General City Code (1944).

¹⁰ Ch. 20, Art. I, §§ 224-230, Code of Ordinances of the City of Mobile.

¹¹ §§ 85-138, 85-139, Code of City of Atlanta (1942).

¹² Art. 76-22, Art. 77-14, Dallas City Code (1941).

¹³ Art. III, §§ 2207-2216, City Code of Houston (1942).

¹⁴ Ch. 198.7A, §§ 1-6, Municipal Code of Chicago.

¹⁵ ORD., To prohibit discriminatory practices in employment, etc., §§ 1-10, passed Jan. 31, 1947.

Cleveland,¹⁶ Youngstown,¹⁷ Philadelphia¹⁸ and Milwaukee.¹⁹ Phoenix,²⁰ Richmond, California,²¹ and New York City²² have ordinances which deal with city employment. Miami Beach has an ordinance²³ prohibiting restaurants from displaying signs or other advertisements tending to discriminate because of race, color or creed. Birmingham requires segregation in restaurants,²⁴ gambling places,²⁵ pool and billiard rooms,²⁶ and other public places.²⁷ Atlanta provides for segregation in barbershops,²⁸ graveyards,²⁹ restaurants,³⁰ cabs,³¹ baseball parks³² and bar-

¹⁶ ORD. No. 1579-48, passed Jan. 30, 1950, to supplement Municipal Code of Cleveland (1924) with new §§ 2999-2 to 2999-9.

¹⁷ ORD. No. 51948, Defining and prohibiting unfair employment practices, §§ 1-6, approved May 16, 1950.

¹⁸ ORD., Prohibiting discrimination in employment because of race, color, etc., §§ 1-9, approved Mar. 12, 1948.

¹⁹ ORD. No. 22, To create §§ 106-24—106-29 of the Milwaukee Code, relating to fair employment practices, passed May 13, 1946.

²⁰ ORD. No. 4810, approved April 27, 1948.

²¹ ORD. No. 1303, passed May 16, 1949.

²² Ch. 13, Title A, § 343-8.0, Administrative Code of the City of New York.

²³ ORD. No. 883, adopted June 15, 1949.

²⁴ § 369, General City Code (1944).

²⁵ *Id.* § 597.

²⁶ *Id.* § 939.

²⁷ *Id.* § 859.

²⁸ § 37-129, Code of City of Atlanta (1942).

²⁹ *Id.* § 42-302.

³⁰ *Id.* §§ 53-603—53-605.

³¹ *Id.* § 62-121.

³² *Id.* § 66-1005.

rooms.³³ Albuquerque³⁴ and Cleveland³⁵ have ordinances, specifically applicable to restaurants, prohibiting discrimination in places of public accommodation.

Excepting *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773 (1944), we are referred to no case which holds any regulation either forbidding or requiring racial segregation to be invalid merely because enacted by municipal authority. Factual distinctions may be drawn as to some of these ordinances—some deal with municipal projects for example, not with private enterprises—but each is a product of municipal government. Furthermore, each concerns racial segregation. This widespread governmental practice, though not conclusive, is strongly persuasive, especially as there is no rule of thumb by which to determine whether a regulation is local or constitutes general legislation beyond municipal competence. We see no reason to cast doubt upon the regulations with which we are concerned, and the many similar ones with which we are not concerned, on the sole ground that they owe their existence to local authority; or to say that those which require segregation are, if constitutional, valid when enacted by such authority while those which seek to ameliorate discrimination are not.

History in this very District adds further persuasion. So far as we are informed the term "restaurant" first appeared in municipal regulations in Washington in 1864 when the Council of the City of Washington prohibited the keepers of restaurants, hotels, taverns and ordinaries

³³ *Id.* § 55-217.

³⁴ ORD. No. 768, approved Feb. 12, 1952.

³⁵ ORD. 1016-37, passed Nov. 26, 1934, to supplement Municipal Code of Cleveland (1924) with § 2999-1.

from selling certain liquors to minors or on Sunday.³⁶ The forerunners of these places were the ordinaries or taverns mentioned in the regulations of 1810,³⁷ prohibiting the sale of named liquors at certain times to any person of color. Similar regulations were passed by the local Council in 1853.³⁸ After the adoption of the Fourteenth Amendment in 1868 came the Council Ordinance of June 10, 1869, prohibiting distinction on account of race or color by persons licensed to give concerts, theatrical entertainments, or the like, provided those admitted conducted themselves in an orderly and peaceable manner and paid the regular price.³⁹ Then, in 1870, the Council again regulated restaurants, eating houses, taverns and the like by providing, among other things, that the keepers thereof should not refuse to admit or supply any quiet and orderly person on account of race or color.⁴⁰ When the form of government of the District was changed by the Act of February 21,

³⁶ Act approved Oct. 31, 1864, Corporation Acts of Washington, Sixty-second Council, § 10, p. 11, 12 Corporation Laws of Wash., D.C. (62-65 Councils, 1863-1868) (D.C. Pub. Lib. Ref. No. + K859L, W2741).

³⁷ Act approved Dec. 15, 1810, Corporation Acts of Washington, Ninth Council, c. 17, pp. 29-30, 1 Corporation Laws of Wash., D.C. (1-15 Councils, 1802-1818) (D.C. Pub. Lib. Ref. No. + K859L, W2741).

³⁸ Act approved June 3, 1853, Corporation Acts of Washington, Fiftieth Council, Title 4, c. VII, § 8, p. 81, Sheahan, Washington, D.C. Laws To 1853 (D.C. Pub. Lib. Ref. No. + K859L, Sh 3.3).

³⁹ Act approved June 10, 1869, Corporation Acts of Washington, Sixty-sixth Council, c. 36, p. 22, 13 Corporation Laws of Wash., D.C. (66-68 Councils, 1868-1871) (D.C. Pub. Lib. Ref. No. + K859L, W2741).

⁴⁰ Act approved Mar. 7, 1870, Sixty-seventh Council, c. 42, p. 22, *id.*

1871, *supra*, it was provided in Section 40 that ordinances not inconsistent with the Act should remain in full force until modified or repealed either by Congress or the Legislative Assembly of the District. The Assembly followed by its Act of August 23, 1871,⁴¹ continuing in force such ordinances "providing police regulations for the several businesses of the citizens of the District of Columbia" During this period from 1810 to 1871 the respective local legislative bodies regulated eating places, and also regulated segregation, pursuant to delegation by Congress, under whose eyes their ordinances were left in effect as municipal regulations.

The opinion of Chief Judge Stephens to the effect that the provisions now in question nevertheless are general legislation beyond the competence of the Legislative Assembly lacks the adherence of a majority of this court. Our four brothers who subscribe to that view recognize that the so-called "Jim Crow Cases" upheld as within the bounds of municipal power ordinances requiring segregation. They say those ordinances accorded with local custom, that accordingly they were for the purpose of preserving peace and order, and that this brought them indisputably within municipal power. This we think erroneous. A purpose to preserve peace and order does not bring an ordinance within municipal authority. The definition and punishment of serious crimes, for example, is not within municipal authority because one of the purposes of the criminal law is to preserve peace and good order. Such a purpose is quite appropriate for municipal attention but it does not make legislation municipal. Segregation ordinances have been upheld by the courts as within authority validly delegated to municipalities. The same

⁴¹ Act approved Aug. 23, 1871, Laws of the District of Columbia, 1871-1872, First Session, c. LXIX, § 24, p. 101, 1 Laws of the District of Columbia 1871-1872 (D.C. Pub. Lib. Ref. No. + K859, D634A).

subject with which they deal is involved in this case. If a municipal ordinance may require segregation it may require equal treatment. And if civil rights are involved here they were also involved in the "Jim Crow Cases" and in the mass of local regulations emanating from all sections of the nation to which we have referred. There is no doctrine known to the law that validity or invalidity of legislation rests upon whether or not it conforms with prevailing custom. Such a consideration goes to the wisdom or policy of the legislation, not to its validity. Custom does play a part in judicial consideration when obsolescence is said to have impliedly repealed a law. But we are now concerned with the validity of these regulations when they were enacted and it would be a contradiction in terms to say a law had been impliedly repealed because obsolete when enacted. In any event no such argument can here be made.

It is said that the cases upholding segregation ordinances are not authoritative in this jurisdiction. While they are not controlling they are judicial decisions on the subject under consideration. They are therefore more authoritative than cases decided in this jurisdiction, reviewed at length in the opinion of Judge Stephens, but which involved laws of an entirely different character.⁴²

⁴² For this reason we do not comment at length upon these decisions. Some of the cases, *e.g.*, *Roach v. Van Riswick*, 1 MacArth. & M. 171, 176, 178 (1879), seem in fact to support our view that the equal service provisions of the 1873 Act were municipal regulations. Some of the cases, such as *District of Columbia v. Saville*, 1 MacArth. 581 (1874), and *Smith v. Olcott*, 19 App. D.C. 61 (1901), are of most questionable soundness in view of subsequent decisions of the Supreme Court. *Nebbia v. New York*, 291 U.S. 502, 525 (1934), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See, also, *Carolene Products Co. v. United States*, 323 U.S. 18, 31 (1944).

We need not decide whether Congress intended to grant the Legislative Assembly power to enact laws of a character more general than municipal ordinances or whether such an intent could constitutionally be carried out in this District. Extended consideration recently has been given to this latter subject by committees of Congress studying home rule legislation. It has been urged before these committees that Congress can delegate to an instrumentality of its creation in this District as much legislative authority as has been held valid when extended to territorial governments. No such question is now before us.

In another respect also we must keep the issue clear. It is whether the provisions for equal service are local or municipal in character, not whether restaurants can be regulated to the same degree as inns.⁴³ The regulations are unquestionably valid if they were enacted by competent authority, notwithstanding they impose some restriction upon freedom of contract and the use of property; *Nebbia v. New York*, *supra*, n. 42, at pp. 523-4, and *West Coast Hotel Co. v. Parrish*, *supra*, n. 42, at pp. 391-2, for restaurants, like inns and other enterprises, are subject to reasonable regulation in the public interest. *Powell v. Utz*, 87 F. Supp. 811 (E.D. Wash. 1949); *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533 (1914); *City of Chicago v. R. & X. Restaurant*, 369 Ill. 65, 15 N.E. 2d 725 (1938); *Brown v. Bell Co.*, 146 Iowa 89, 123 N.W. 231 (1909); *Humburd v. Crawford*, 128 Iowa 743, 105 N.W. 330 (1905); *Kimmell v. Westernport*, 140 Md. 506, 117 Atl. 748 (1922); *Liggett Drug Co. v. License Commissioners*, 296 Mass. 41, 4 N.E. 2d 628 (1936); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890); *Rhone v. Loomis*, 74 Minn. 200, 77 N.W.

⁴³ If that were the issue the following language of Lord Mansfield, in *Saunderson v. Rowles*, 4 Burr. 2064, 2068, 98 Eng. Rep. 77, 79 (K.B. 1767), would be pertinent: "The analogy between the two cases of an inn-keeper and a victualler is so strong that it cannot be got over."

31 (1898); *State v. Freeman*, 38 N.H. 426 (1859); *De Roos v. Chapman*, 106 N.J.L. 6, 147 Atl. 570 (1929); *West. Pa. Restaurant Assn. v. Pittsburgh*, 366 Pa. 374, 77 A. 2d 616 (1951); *Ogden City v. Leo*, 54 Utah 556, 182 Pac. 530 (1919); and *St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571 (1887).

For the reasons stated our opinion is that the equal service requirements of the Act of 1873, as applied to licensed restaurants, are regulations of a local or municipal character validly enacted by the Legislative Assembly.

II. The regulations have not been repealed. It is not intimated in the opinion either of Judge Stephens or of Judge Prettyman that repeal has occurred in any ordinary manner if the provisions are municipal or local. But we consider certain contentions advanced by appellant Company in this regard.

The view of the Municipal Court that the Organic Act of June 11, 1878, 20 Stat. 102, accomplished repeal, is fully answered by Chief Judge Cayton in the Municipal Court of Appeals, as follows:

“ * * * The express words of the first section of the Organic Act are that ‘all laws now in force relating to the District of Columbia not inconsistent with the provisions of this Act shall remain in full force and effect.’ While the 1878 Act reorganized the form of the District Government and the administration thereof, it did not by implication or otherwise repeal, supersede or supplant the whole body of pre-existing law governing the District.” (81 A. 2d at 255)

It is argued that the Code of 1901 (31 Stat. 1189, 32 Stat. 520, 33 Stat. 1012) brought repeal. Quite the contrary. Insofar as here applicable the plan adopted by the Code of 1901, as set forth in Section 1636,⁴⁴ was to

⁴⁴ “All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the

repeal "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature," and "all like acts and parts of acts of the legislative assembly of the District of Columbia * * * except" those then described. Among the latter, and therefore not repealed, are the following:

"Acts and parts of acts relating to * * * police regulations, and generally all acts and parts of acts relating to municipal affairs only * * *."

Furthermore, Section 1640, 31 Stat. 1436 (1901), § 49-304, D. C. Code (1951), provides:

"Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law * * * or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

As also set forth in the opinion of Judge Cayton both Congress and the courts have consistently recognized the continuing validity of acts of the Legislative Assembly unless expressly superseded. We do not repeat the numerous decisions in this jurisdiction to which he refers. (81 A. 2d at 253-4)

We must also reject the contention that the equal service law is impliedly repealed by the General Licensing Act,⁴⁵ originally enacted in 1902, and regulations there-

District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except: * * * Acts and parts of acts relating to * * * police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations." (§ 1636, D.C. Code (1901), 31 Stat. 1434, 1435 (1901), § 49-304, D. C. Code (1951))

⁴⁵ §§ 47-2301 *et seq.*, D.C. Code (1951).

under. Implied repeal is not favored. *United States v. Borden Co.*, 308 U.S. 188, 198-9 (1939).⁴⁶ To destroy the equal service provisions by implication from a general licensing law could have some support in logic or reason only if they were in a licensing law. This is not the case. They regulate in certain respects the conduct of restaurants which have been licensed under other laws.

We come now to the views expressed by Judge Prettyman. He does not reach a conclusion whether the equal service provisions are general legislation or municipal ordinances. If they are the former he says they are invalid or repealed; if the latter he says they have been abandoned, which is another way of saying they have been impliedly repealed. Of course there has been no legislative abandonment or repeal, because the Code of 1901, which has not been abandoned or repealed, expressly continues in effect acts of the Legislative Assembly relating to municipal affairs only, Section 1636, *supra*, and "any municipal ordinance or regulation," Section 1640,

⁴⁶ In the language of Chief Justice Hughes, in the case cited,

"It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States v. Tynen*, 11 Wall. 88, 92; *Henderson's Tobacco*, 11 Wall. 652, 657; *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61, 62. The intention of the legislature to repeal 'must be clear and manifest.' *Red Rock v. Henry*, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' See, also, *Posados v. National City Bank*, 296 U.S. 497, 504."

supra. And we are aware of no doctrine of implied repeal by executive abandonment. No precedent is adduced for any such doctrine. Non-use does not repeal. As Judge Prettyman recognizes, the cases to which he refers but upon which he does not rely do not hold that executive non-use can repeal legislation. Three of the cases go back to earlier days in Pennsylvania, namely, *James v. Commonwealth*, 12 S. & R. 220 (1825); *Wright v. Crane*, 13 S. & R. 447, 452 (1826); *Porter's Appeals*, 30 Pa. 496, 499 (1858). The first held that the *common law* "ducking" or "cucking" punishment was no longer available for the offense of being a "common scold". No question of executive non-use of legislation was involved. The other two cases discuss a doctrine of obsolescence but refuse to apply it. And in a later Pennsylvania case, *Homer v. Commonwealth*, 106 Pa. 221, 226 (1884), it is said,

" . . . It was long ago settled that an Act of Parliament cannot be repealed by *non user*. . . . The settled rule is, that a statute can be repealed only by express provision of a subsequent law, or by necessary implication. . . ."

Hill v. Smith, 1 Morris 70 (1840), is an Iowa case. The highest court of that state, in *Pearson v. International Distillery*, 72 Iowa 348, 357, 34 N.W. 1, 5 (1887), attributed the decision in *Hill v. Smith* to inconsistent statutes, not to non-use, saying,

" . . . It would surely astonish the profession should it be announced that . . . [criminal] statutes cease to have the force of law through non-user. We know of no principle which supports such doctrine. . . ."

Snowden v. Snowden, 1 Bland 550, 556 (1829), is a Maryland case in which the court, also rejecting repeal by non-use, said,

“ * * * No Judge or Court, either of the first or last resort, can have any right to legislate; and there can be no difference between the power to declare an Act of Assembly obsolete, and the power to enact a new law. * * * ”

See, also, *State v. Mellor*, 140 Md. 364, 117 Atl. 875 (1922); 1 Sutherland, *Statutory Construction* § 2034 (3d ed. 1943), and *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 14 P. 2d 67 (1932), where it is said that delayed action by those charged with the execution of laws may be considered in mitigation of punishment but cannot annul the law. To like effect is *Naughton v. Boyle*, 129 Misc. 867, 223 N.Y.S. 432 (1927).

We refer to these cases which concern statutes not because we consider the 1873 regulations to be anything but municipal ordinances, but because the cases mentioned by Judge Prettyman involve statutes. However, no decision is cited that a different rule regarding non-use applies to municipal ordinances and we think none exists.

The theory of repeal by abandonment rests upon the premise that the equal service provisions were conditions imposed upon licenses by the licensing authority. We think this premise erroneous in both fact and law. While the provisions are applicable to licensed businesses they are in no sense regulatory conditions imposed upon a license. There is a clear distinction. See *Matter of Russell*, 163 Cal. 668, 126 Pac. 875 (1912). A simple illustration will help. A business is required by municipal ordinance, for example, to clear from the sidewalk snow from the roof of its premises (Art. III, § 1, Police Regulations of the District of Columbia (1944)). This is a municipal ordinance regulatory of a licensed business; but it is not a condition imposed upon a license. Neither in words nor in purport are the equal service provisions a condition. The penalties which fol-

low upon a court conviction of violation, including forfeiture of license without right of renewal for a year, assume a previously granted license. Like many other laws they regulate in a certain respect the conduct of a licensed business, but they are not like health or other requirements which must be satisfied before a license is granted. See, for example, §§ 47-2302 and 5-317, D. C. Code (1951), regarding fire prevention; Sec. XX of the Zoning Regulations, 1950, regarding a certificate of occupancy and previous inspection. The fact that hundreds of licenses have been issued without mention of the equal service provisions is therefore not significant. These same hundreds of licenses no doubt have been issued also without mention of any number of provisions applicable to the businesses concerned, such as those which fix minimum wages, maximum prices, regulate the employment of minors or require restaurants to have all draperies and decorations made of flameproof material (Art. XVII, § 2, Police Regulations of the District of Columbia (1944)).⁴⁷ The equal service regulations were not made by a licensing authority or administrative agency. They were enacted by the Legislative Assembly, which was a legislative body.⁴⁸ The power to regulate licensed businesses

⁴⁷ One of the penalties which follow upon court conviction of violating the equal service provisions is forfeiture of license, which cannot be reissued for one year. This provision must be administered by the licensing authority, but it of course assumes that the penalized restaurant has previously been licensed.

It has been contended that the forfeiture provision takes the case out of the jurisdiction of the Municipal Court, but as we read the ordinance forfeiture is not for the court.

⁴⁸ Section 30 of the Act of February 21, 1871, 16 Stat. 419, creating the Legislative Assembly provided for "such ministerial officers as may be deemed necessary to carry into effect the laws of said District * * *." Pursuant to this authority

does not transform a legislative body into a licensing authority. No one would make such a suggestion with regard to Congress.

The concurring opinion makes still another assumption which we think is without basis, namely, that the licensing authority in this District in 1942, and perhaps at other unmentioned times, promulgated "apparently complete regulations" of restaurants but omitted the 1873 provisions, thus abandoning them. The 1942 regulations are solely health and sanitary regulations. In Section 2 they provide that no license shall be issued for a restaurant until the health officer certifies that the regulations have been complied with. But not even other conditions, to which we have referred, which must be satisfied before the license is granted, are included. They are not therefore abandoned. The 1942 regulations do not constitute and there is not in existence a complete codification of ordinances regulating restaurants, so that in fact there has been no omission of the equal service provisions from such a codification. Further, there not only is not, there never was, any law, ordinance or regulation exacting a promise to comply with the equal service provisions as a condition for obtaining or renewing a license. Failure of the authorities to provide for such a promise is therefore the abandonment of nothing. Further still, Congress, in

the Assembly created the office of Register. Act approved Aug. 21, 1871, Laws of the District of Columbia, 1871-1872, First Session, c. LXIV, part ii, p. 71, 1 Laws of the District of Columbia 1871-1872 (D.C. Pub. Lib. Ref. No. + K859, D634A). Section 2 of this Act, *id.* p. 77, provided the Governor was to appoint the Register. He was responsible to the Governor, taking oath before him and executing a bond satisfactory to him. Act approved Aug. 23, 1871, Laws of the District of Columbia, 1871-1872, First Session, c. CVIII, §§ 14, 45 and 48, part ii, pp. 149, 161 and 162, *id.* By Act approved Aug. 23, 1871, Laws of the District of Columbia, 1871-1872, First Session, c. LXIX, part ii, p. 87, *id.*, the Register was ordered to issue licenses, sign and impress them with the seal of his office.

expressly saving from repeal acts of the Legislative Assembly relating to municipal affairs only, and expressly leaving unaffected the "operation or enforcement" of municipal ordinances and regulations; did not except the equal service provisions either by name or by excepting ordinances not theretofore the subject of court prosecutions. The concurring opinion seems to concede that acts of Congress cannot be repealed by non-enforcement or non-use. We see no reason why the same principle should not apply to ordinances which Congress has thus continued in effect.

The concurring opinion states that local officials as well as licensees have at times been ignorant of the equal service provisions. Ignorance of a law, while it might bear upon the penalty which should be imposed for its violation, does not place it out of operation. Ignorance of a *fact* may be material on the question of guilt where intent is an element of an offense, but this has nothing to do with the operative effect of a law.⁴⁹

Comparison of present enforcement of the regulations with the imposition of a secret licensing condition is misplaced. Prior to the non-compliance here charged appellant Company, was made aware of the regulations and of the position of the District that they were in effect. The Company's non-compliance rested upon its belief they were invalid or repealed, not upon ignorance of the regulations. It does not contend otherwise. Since there has been no seerecy our abhorrence of tyrann-

⁴⁹ See *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Balint*, 258 U.S. 250 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910); *Reynolds v. United States*, 98 U.S. 145, 167 (1878); *New York Cent. & H. R. R. Co. v. United States*, 239 Fed. 130 (2d Cir. 1917); *Hemans v. United States*, 163 F. 2d 228 (6th Cir.), cert. denied, 332 U.S. 801, rehearing denied, 332 U.S. 821 (1947); *Blumenthal v. United States*, 88 F. 2d 522 (8th Cir. 1937).

nical attempts to impose punishment for violating a law kept secret until after its violation should be reserved for an appropriate case. If the reference to secrecy is intended to analogize the present situation to one where ordinances applicable to a licensed business have been altered after grant of a license, few questions have become more firmly settled than that regulatory authority may validly alter the conditions upon which a going concern may continue to operate. *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915), involving a zoning ordinance; *Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916), involving a smoke abatement ordinance; *Reinman v. Little Rock*, 237 U.S. 171 (1915), involving an ordinance regulating livery stables; see, also, *Queenside Hills Co. v. Saxl*, 328 U.S. 80 (1946); *Chicago & Alton R.R. v. Trambarger*, 238 U.S. 67 (1915), and *Atlantic Coast Line v. Goldsboro*, 232 U.S. 548 (1914).

There is no vagueness in the provisions alleged to have been violated. The Company makes no such complaint, and we see no possible application to this case of the sound and settled principle which condemns a criminal statute if it is so confusing or vague as to trap the innocent. *United States v. Cardiff*. — U.S. — (decided Dec. 8, 1952).

The truth is the regulations simply lay unused for many years. This does not justify the intimation that they were unknown to appellant Company until after it violated them, or that they are conditions imposed upon licenses, or that they have been abandoned by omission from non-existent compilations of regulations, or that they are vague. Because of long non-use, because of the legal question of the competence of the Legislative Assembly to enact them, and because of the question whether they have been repealed, the District authorities seek to establish their legal status before insisting upon general compliance. This is a reasonable course to pursue.

III. The position that the equal service provisions are not now enforceable because of abandonment or non-use by officials who are said to have had control over them as licensing conditions leads inevitably to the conclusion that such officials can now revive and enforce them. To repeal a regulation is to make a regulation, and whoever can do the one can do the other. The abandonment argument in the end destroys itself insofar as this case is concerned, for if these regulations can be placed out of operation by non-use on the part of District officials they can be put back into operation by use on the part of the same officials.

IV. We are concerned only with the equal service provisions of the Act of 1873, not its requirements for filing sales prices, *et cetera*. The latter are not now involved. They may call for administrative or legislative revision, or coordination with subsequent legislation. We do not deny that long non-use of regulations creates some problems, but they can be solved without repudiating the regulations. As the concurring opinion states, it is not for courts to determine what the law on the subject ought to be. If an ordinance which required segregation rather than equal service were before us, and if it were found to be constitutional, as to which we express no opinion, the same approach we now take should be followed. The ordinance before us was enacted by a legislative body and has always been subject to legislative modification or repeal. No modification or repeal has been enacted. On the contrary, by the Code of 1901 Congress expressly kept in operation the municipal ordinances and regulations of the Legislative Assembly, which include the equal service regulations. Whether we approve or disapprove of these regulations we cannot, within the normal limits of the judicial function, say they shall not be the law.

We have not separately discussed the Company's suggestion that the equal service provisions have become unenforceable by reason of obsolescence. It is enough to point out that custom has not moved away from equal treatment, leaving these regulations derelicts of the past. Custom has moved toward equal treatment, as is shown by developments of recent years in the Government, in the armed services, in industry, in organized labor, in educational institutions, in sports, in the theatre, and in restaurants in this community, as examples. Neither time nor neglect should bar the legislative application to licensed restaurants in this community of the principle which opposes discrimination on account of race or color. We would affirm the judgment of the Municipal Court of Appeals.

[fol. 121]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 11,039

JOHN R. THOMPSON COMPANY, INC., a Body Corporate, Ap-
pellant,

v.

DISTRICT OF COLUMBIA, Appellee

No. 11,044

DISTRICT OF COLUMBIA, Appellant,

v.

JOHN R. THOMPSON COMPANY, INC., a Body Corporate, Ap-
pellee

Appeals from the Municipal Court of Appeals for the
District of Columbia

JUDGMENT—Filed January 22, 1953

Before: Stephens, Chief Judge, and Edgerton, Clark, Wil-
bur K. Miller, Prettyman, Proctor, Bazelon, Fahy and
Washington, Circuit Judges

These appeals came on to be heard on the transcript of
the record from the Municipal Court of Appeals, and were
argued by counsel.

On consideration whereof, it is now here ordered and
adjudged by this Court that the judgment of the said Munic-
ipal Court of Appeals appealed from in these cases be, and
the same is hereby, affirmed as to the first count of the
information, and reversed as to the second, third and fourth
counts of the information, and that the cause involved herein
be, and it is hereby remanded to the said Municipal Court
of Appeals for further proceedings not inconsistent with
the opinion of this Court.

It is further ordered by the Court that each party bear
its own costs on these appeals.

Per Chief Judge Stephens.

Circuit Judges Clark, Wilbur K. Miller, Proctor and Prettyman concur with Chief Judge Stephens in the judgment.

Circuit Judges Clark, Wilbur K. Miller and Proctor concur in the opinion by Chief Judge Stephens.

Separate opinion by Circuit Judge Prettyman concurring in the result; Circuit Judge Miller, who concurs in the opinion by Chief Judge Stephens, agrees with the opinion by Circuit Judge Prettyman if the view that the enactments are regulatory ordinances were accepted.

Dissenting opinion by Circuit Judge Fahy, with whom Circuit Judges Edgerton, Bazelon, and Washington concur.

[File endorsement omitted.]

[fol. 122] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

DESIGNATION OF RECORD—Filed February 3, 1953

To: The Clerk of the United States Court of Appeals for
the District of Columbia Circuit.

The Clerk will please prepare a certified transcript of
record for use on petition to the Supreme Court of the
United States for Writ of Certiorari in the above entitled
cases, and include therein the following:

1. Order of July 5, 1951, granting appeals from the Municipal Court of Appeals for the District of Columbia.
2. Order of July 20, 1951, consolidating appeals.
3. Order of October 6, 1951, setting cases for hearing in banc.
4. Joint Appendix.
5. Minute entry of argument.
6. Opinion of the Court, concurring opinion of Judge Prettyman, and dissenting opinion of Judge Fahy.
7. Judgment of the Court.
8. This Designation.

[fol. 123] 9. Clerk's certificate.

(S.) Vernon E. West, Corporation Counsel, D. C.;
(S.) Chester H. Gray, Principal Assistant Corporation Counsel, D. C.; (S.) Edward A. Beard, Assistant Corporation Counsel, D. C., Attorneys for District of Columbia, Appellee in No. 11,039 and Appellant in No. 11,044, District Building, Washington, D. C.

I certify that on the 3rd day of February, 1953, I mailed, postage prepaid, copy of the foregoing and annexed Designation of Record to Ringgold Hart, Esq., of counsel for John R. Thompson Company, Inc., at 815-15th Street, N. W., Washington, D. C., his last known address.

(S.) Chester H. Gray, Principal Assistant Corporation Counsel, D. C.

[File endorsement omitted.]

[fol. 124] Clerk's Certificate to foregoing transcript
omitted in printing.

A handwritten squiggle or mark, possibly a stylized letter or a signature, located on the left side of the page.

[fol. 126] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1952

No. 617

DISTRICT OF COLUMBIA, Petitioner,

vs.

JOHN R. THOMPSON COMPANY, INC.

ORDER ALLOWING CERTIORARI—Filed April 6, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is assigned for argument on Monday, April 27, next.

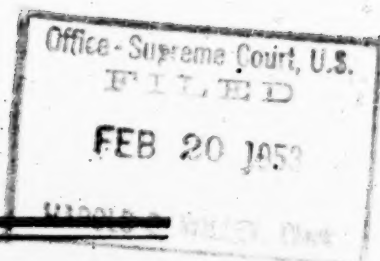
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7489)

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SUPREME COURT, U.S.

No.

617



IN THE
Supreme Court of the United States

October Term, 1952

DISTRICT OF COLUMBIA, *Petitioner,*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT.**

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
*Principal Assistant Corporation
Counsel, D. C.,*

EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

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Act approved March 7, 1870, Corporation Laws of Washington,

D. C., 13, Sixty-seventh Council, General Laws, Ch. 42, p.

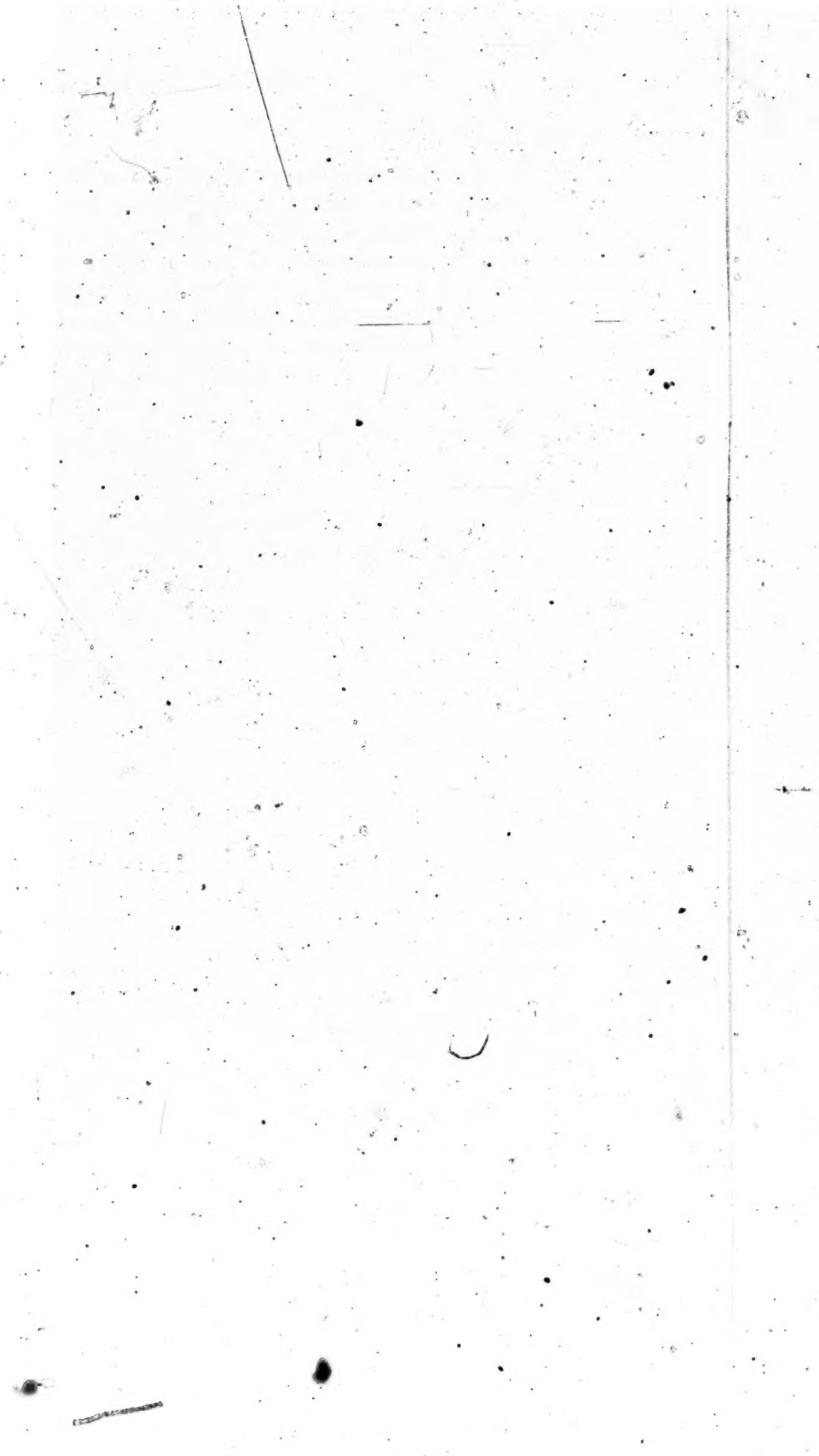
22 9, 19, 32, 34

TEXTS:

27 Words and Phrases, Perm. Ed. 735 18

MISCELLANEOUS:

The President's State of the Union Address, Vol. 99, Congressional Record, Feb. 2, 1953, No. 18, p. 783, daily issue; House Document No. 75, 83rd Congress, 1st Sess., p. 13	7, 9
H. R. 1395, 83rd Congress, 1st Session, A Bill To provide for home rule and reorganization in the District of Columbia	8
S. 999, 83rd Congress, 1st Session, A Bill To provide an elected city council, school board, and nonvoting delegate to the House of Representatives for the District of Columbia, and for other purposes	8
<i>The Federalist</i> , No. 43	12



IN THE
Supreme Court of the United States

October Term, 1952

No.

DISTRICT OF COLUMBIA, *Petitioner,*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT.**

The District of Columbia, through its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Municipal Court (R. 4) is not reported. The opinion (R. 25), the concurring opinion (R. 37) and dissenting opinion (R. 52) of the Municipal Court of Appeals are reported at 81 A. 2d 249. The opinion (R. 60), the concurring opinion (R. 89) and dissenting opinion (R. 100) of the United States Court of Appeals have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered January 22, 1953 (R. 121). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two laws which made it a penal offense for the owner of a restaurant in the District of Columbia to refuse service to a person on account of race or color. The Court of Appeals for the District of Columbia Circuit has held that these Acts are "presently unenforceable." The questions presented are:

1. Whether Congress has power under the Constitution to delegate to the District of Columbia authority to enact local anti-discrimination legislation such as the Acts of 1872 and 1873.

2. If Question 1 is answered in the affirmative, whether the Organic Act of 1871 constituted a delegation of such legislative authority to the Legislative Assembly of the District of Columbia; and whether the Acts of 1872 and 1873 were proper exercises by the Legislative Assembly of the authority granted it in the Organic Act of 1871.

3. If the Acts of 1872 and 1873 are held to have been valid when enacted, whether they are no longer enforceable as having been repealed or "abandoned".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are printed in Appendix A, *infra*, pp. 21-34.

STATEMENT OF THE MATTER INVOLVED

By "An Act to Provide a Government for the District of Columbia", approved February 21, 1871, 16 Stat. 419, Congress provided a territorial form of government for the ter-

ritory of the United States within the limits of the District of Columbia. By that Act Congress constituted that government a "body corporate for municipal purposes", and provided in Section 5 thereof

"That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. * * *"

Section 18 provided:

"Sec 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

The Legislative Assembly enacted "*An Act regulating restaurants, and other public places, and for other purposes*", approved June 20, 1872, Laws, District of Columbia, Ch. LI (App. A, p. 26), and "*An Act regulating sales in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms, and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act*", approved June 26, 1873, Laws, District of Columbia, Ch. XLVI (App. A, p. 28). Subsequent to 1873 these Acts of the Legis-

lative Assembly were not enforced. (See opinion of Judge Clagett, footnotes 4 and 5, R. 41, 42). The provisions of the Act of February 21, 1871, providing an executive and a legislative assembly for the District of Columbia were repealed by the Temporary Organic Act of 1874, approved June 20, 1874, 18 Stat. 116.

On August 1, 1950, the Corporation Counsel of the District of Columbia filed in the Municipal Court for the District an information (No. 111019; R. 1) charging John R. Thompson Company, Inc., as a restaurant keeper in the District, with violation of the Acts of the Legislative Assembly of 1872 and 1873—by refusal of service, solely because they were members of the Negro race, to named well-behaved and respectable persons. The information was in four counts, the first charging violation of the Act of 1872, the second, third and fourth with violation of the Act of 1873 (R. 1-3). The Municipal Court, by Judge Frank H. Myers, *sua sponte*, entered an order quashing the information without arraigning the defendant (R. 22) on the ground that the said Acts of the Legislative Assembly had been held by him in an earlier prosecution against the same defendant (No. 99150), alleging similar violations on a different date (R. 17), to have been repealed by implication by the Organic Act of June 11, 1878 (R. 4). The District of Columbia took an appeal from that order to the Municipal Court of Appeals (R. 19).

The Municipal Court of Appeals, as to the first count of the information, affirmed the order of the Municipal Court, Judge Hood being of the view that both the 1872 and 1873 enactments were invalid as beyond the power of the Legislative Assembly (R. 52), Judge Clagett thinking that the 1872 enactment was repealed by the enactment of 1873 "at least so far as restaurants are concerned" (R. 48). As to the second, third and fourth counts of the information, the Municipal Court of Appeals reversed the order of the Municipal Court, Judge Clagett being of opinion that the

1873 enactment was valid when enacted (R. 47) and that it had never been repealed (R. 52), and Chief Judge Cayton being of the view that both the 1872 and 1873 enactments were valid when enacted (R. 32) and that both were presently enforceable (R. 32-36).

The Thompson Company petitioned the United States Court of Appeals for the District of Columbia Circuit for the allowance of an appeal from the judgment of the Municipal Court of Appeals in so far as it reversed the order of the Municipal Court quashing the information as to the second, third and fourth counts. The District, on its part, petitioned for the allowance of a cross-appeal from the judgment of the Municipal Court of Appeals in so far as it affirmed the order of the Municipal Court in quashing the information as to the first count. The United States Court of Appeals granted both petitions (R. 56), ordered the two appeals consolidated (R. 57) and *sua sponte* ordered the appeal and the cross-appeal heard in banc (R. 58).

The United States Court of Appeals, by a divided Court, affirmed the judgment of the Municipal Court of Appeals as to the first count of the information and reversed the judgment as to the second, third and fourth counts. Chief Judge Stephens and Judge Clark, Judge Miller and Judge Proctor held that the enactments of the Legislative Assembly were of the character of general legislation, the power to enact which the Congress could not constitutionally delegate to the Legislative Assembly, and that the said Acts were repealed by the 1901 Code (R. 85); Judge Prettyman thought it "unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances" but concurred in the judgment announced by Chief Judge Stephens. His view was "If they (the Acts of 1872 and 1873) were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority

which originally adopted them" (R. 99). Judge Miller concurred "in the opinion of Chief Judge Stephens, but if the view that the enactments are regulatory ordinances were accepted," he agreed with what is said in Judge Prettyman's opinion (R. 100). Judge Fahy, Judge Edgerton, Judge Bazelon and Judge Washington dissented on the grounds that the Acts of the Legislative Assembly were local municipal ordinances (R. 102), lawfully adopted under a valid delegation of authority by Congress, and that the Acts of the Legislative Assembly have not been repealed and are presently enforceable (R. 100).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia Circuit erred

(1) In holding that the information could not be validly prosecuted;

(2) In holding that Congress did not have constitutional authority to delegate power to the Legislative Assembly to enact the Acts in question;

(3) In holding that Congress in the Act of 1871 did not effectively and constitutionally delegate to the Legislative Assembly authority to enact the Acts of 1872 and 1873;

(4) In holding that the Acts of the Legislative Assembly are presently unenforceable either because they were repealed or "abandoned";

(5) In holding that the Acts of the Legislative Assembly were invalid when enacted.

REASONS FOR GRANTING THE WRIT

I

The United States Court of Appeals for the District of Columbia Circuit has decided questions of general importance which have not been, but should be, settled by this Court.

By its judgment in this case the United States Court of Appeals has struck down as invalid Acts of the Legislative

Assembly of the District of Columbia by which the people of the District, through their lawfully elected representatives, prohibited racial discrimination in public eating places in the District of Columbia. The case thus embraces two subjects of substantial national and local concern—racial discrimination and Congressional power to grant home rule—for the Court of Appeals based its ruling on the premise that Congress could not, under the Constitution, delegate to the Legislative Assembly authority to legislate to prohibit acts of racial discrimination.

Importance to the Nation and the District of Columbia

The importance of this case to the people of the entire Nation is manifest. As Chief Judge Stephens pointed out in his opinion,

“ * * * the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's capital, of national interest.” (R. 82)

The importance to the Nation of solving the problem of racial discrimination in the United States, and particularly in the District of Columbia, is so great that the President devoted a portion of his State of the Union Address to that subject. The President said:

“Our civil and social rights form a central part of the heritage we are striving to defend on all fronts and with all our strength.

“I believe with all my heart that our vigilant guarding of these rights is a sacred obligation binding upon every citizen. To be true to one's own freedom is, in essence, to honor and respect the freedom of all others.

“A cardinal ideal in this heritage we cherish is the equality of rights of all citizens of every race and color and creed.

"We know that discrimination against minorities persists despite our allegiance to this ideal. Such discrimination—confined to no one section of the Nation—is but the outward testimony to the persistence of distrust and of fear in the hearts of men.

"This fact makes all the more vital the fighting of these wrongs by each individual, in every station of life, in his every deed.

"Much of the answer lies in the power of fact, fully publicized; of persuasion, honestly pressed; and of conscience, justly aroused. These are methods familiar to our way of life, tested and proven wise.

"I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia, including the Federal Government, and any segregation in the Armed Forces."

(Vol. 99, Congressional Record, February 2, 1953, No. 18, p. 783, daily issue; House Document No. 75, 83rd Congress, 1st Session, p. 13)

The Court will take judicial notice of the fact that for many years the people of the District of Columbia have been urging the Congress to restore to them some measure of home rule, i.e., the right to participate as Americans in their local and national governments. Partly in response to the petitions of the people of the District, and also motivated by the necessity of divesting itself of the details of municipal management in order to devote more of its attention to national problems, the Congress has been considering various plans for turning a greater degree of local government over to the District of Columbia.¹

This problem of local self-government in the District of Columbia is of such national importance that in his State of the Union Address the President said of it:

¹ Bills to grant home rule have already been introduced in the 83rd Congress, H. R. 1395, S. 999.

"Here in the District of Columbia, serious attention should be given to the proposal to develop and to authorize, through legislation, a system to provide an effective voice in local self-government.

* * * (Id. p. 13).

The case is also of great importance to the people of the District of Columbia. By " * * * the enactment of March 7, 1870, of the 67th Council of the City of Washington (App. A, p. 35)—which the enactments of 1872 and 1873 of the Legislative Assembly substantially paralleled * * * " (R. 85) and by the said enactments of 1872 and 1873, the people of the District, through their lawfully elected representatives,² had taken action to stamp out the discrimination on account of race, color, or previous condition of servitude which the Court of Appeals judicially noted " * * * was customary in the District of Columbia at the time the enactments were promulgated." (R. 81)

These questions should be settled by this Court

The effect of the ruling of the Court of Appeals is three-fold. First, it freezes the law of the District of Columbia in the pattern of racial discrimination which the people of the District of Columbia had thrice attempted, through their own representatives, to reject. Second, by holding that

" * * * the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of 'general legislation,' the power to enact which Congress could not constitutionally, and did not, delegate to the Legislative Assembly" (R. 79),

the Court of Appeals has erected a barrier to effective home rule in the District of Columbia. Third, under this decision, not only is Congress impotent to determine what degree of

² An Act to continue, alter and amend the charter of the City of Washington, approved May 17, 1848, 9 Stat. 223, ch. 42, Sec. 5; D. C. Code, 1951, p. XXXVIII.

An Act to provide a government for the District of Columbia, approved February 21, 1871, 16 Stat. 419, ch. 62, Sec. 5, 7; App. A, p. 21, 23.

legislative authority it is wise, expedient or desirable to delegate, within the terms of the Constitution, to a subordinate District of Columbia Government, but in the absence of "a precise criterion" by which to determine "what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated" (R. 79), every delegation of legislative authority by Congress is subject to vague, unspecified standards which could only be determined after protracted litigation in the courts.

II

The United States Court of Appeals for the District of Columbia Circuit, in deciding the substantial questions here presented relating to the construction of the Constitution and of Acts of Congress, has not given effect to applicable decisions of this Court.

To determine whether or not the information in this case can be validly prosecuted, two preliminary questions must be answered. As stated by the Court of Appeals, those questions are:

" * * * The first, were the enactments of the Legislative Assembly of 1872 and 1873 on which the information against the Thompson Company was based within the power of the Assembly; the second, were those enactments repealed." (R. 65)

In reaching the conclusion that

" * * * the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of 'general legislation,' the power to enact which the Congress could not constitutionally, and did not, delegate to the Legislative Assembly" (R. 79),

the Court of Appeals relied on only two decisions of this Court, *Stoutenburgh v. Hennick*, 129 U. S. 141, and *Metropolitan Railroad Company v. District of Columbia*, 132 U. S. 1. It approached the first question by approving the suggestion made by the Supreme Court of the District of Columbia in General Term in *Roach v. Van Renswick*, MacArthur and Mackey's Reports 171, that

" * * * for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty." (R. 79)

It is respectfully submitted that the asserted lack of a criterion stems from the fact that the Court of Appeals failed to consider the decisions of this Court in cases decided before and after *Stoutenburgh v. Hennick*, 129 U. S. 141, defining the power of Congress to delegate legislative authority to the District of Columbia Government, and for that reason attributed to the *Stoutenburgh* decision an effect which this Court clearly did not intend to give it. It is further submitted that the decisions of this Court which were not considered by the Court of Appeals not only supply the needed criterion but show that this Court has never doubted that Congress has the constitutional power to, and in fact did, delegate sufficient authority to the Legislative Assembly to enact the Acts in question.

Article I, Section 8, Clause 17, of the Constitution of the United States, specifically empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

The word "exclusive" was plainly intended only to exclude the ceding states from exercising legislative authority

within the District of Columbia; it does not preclude Congress from delegating subordinate authority to a local government. *The Federalist*, No. 43; *Roach v. Van Renswick*, MacArthur and Mackey, 171, 174. To be sure, this Court in *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, held that a portion of an act of the Legislative Assembly was void in that it constituted a regulation of interstate commerce, since the latter subject-matter rested within the exclusive power of Congress. That case does not, as the majority judges in the Court of Appeals evidently believed, support a limitation on the power of Congress under the Constitution, if it sees fit to do so, to delegate to a subordinate legislative body in the District of Columbia authority to enact laws which are entirely local in nature and effect. On the contrary the Court, in an opinion by Mr. Chief Justice Fuller, said:

“It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.”

In 1904, in *Binns v. United States*, 194 U. S. 486, 491, in affirming a conviction under an Alaska penal statute, this Court again emphasized, in comparing the types of government provided for Alaska and the District of Columbia, the plenary power which the Constitution vests in Congress in legislating for the territories and the District:

"It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a *quasi* state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the District of Columbia it had adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory. *It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may intrust to them a large volume of legislative power, or it may, by direct legislation, create the whole body of statutory law applicable thereto.*" [Emphasis supplied.]

In an earlier case, *Barnes v. District of Columbia*, 91 U. S. 540, 544, not cited by the Court of Appeals, this Court, in discussing the powers granted to the District of Columbia government created by the Organic Act of 1871, similarly recognized that the scope of such delegation of authority to a subordinate legislative body was for Congress to determine:

"A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often

as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

The same principles found further expression in *Metropolitan Railroad Company v. District of Columbia*, 132 U. S. 1. The Court in that case reviewed the course of congressional legislation from 1800 to 1889 applicable to the District of Columbia, and made the following pertinent observations:

" * * * All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. * * * It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District Corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense."

[132 U. S. at pages 8-9.]

Accord: *Welch v. Cook*, 97 U. S. 541, 542 ("It is not open to reasonable doubt that Congress had power to invest the District Government with legislative authority, or that it did so invest that government, * * *"); *Mattingley v. District of Columbia*, 97 U. S. 687; *First National Bank of the City of New York v. Shoemaker*, 97 U. S. 692, 693.

As has already been stated, the doctrine of the above-cited cases was neither overruled nor modified by this Court's decision in *Stoutenburgh v. Hennick*, 129 U. S. 141. That case held only that Congress could not, and in the particular instance did not, authorize the District of Columbia to regulate interstate commerce. The "general" legislation which the Court in that case stated was not a proper subject matter for delegation to a subordinate legislative body in the District of Columbia is, therefore, legislation of a national nature which only Congress could enact, such as that relating to the regulation of interstate commerce. The *Stoutenburgh* case is not an authority, as the Court of Appeals in the present case apparently regarded it, for the view that the Constitution precludes Congress from delegating to a subordinate legislative body in the District of Columbia authority to enact local anti-discrimination legislation, even though in some other sense such legislation might be characterized as "general". Referring to earlier precedents dealing with the scope of the commerce clause, e.g., *Robbins v. Shelby County Taxing District*, 120 U. S. 489, the Court in the *Stoutenburgh* case reaffirmed the exclusive power of Congress over "that class of subjects which calls for uniform rules and national legislation", as distinguished from "that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." (Citing *Cooley v. Philadelphia Board of Wardens*, 12 How. 299; and *Gilman v. Philadelphia*, 3 Wall. 713.) The word "general" should properly be restricted to that sense, i.e., "that class of subjects which

calls for uniform rules and national legislation" by the Congress.

Acting within the ambit of its constitutional powers, as defined in the cases referred to above, Congress in the Organic Act of 1871 provided that "the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act * * *; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District, in as ample manner as if this law had not been enacted." Sections 17 and 20 of the Act imposed various specific prohibitions upon the legislative authority delegated to the Legislative Assembly, *e.g.*, divorce, remission of fines, penalties or forfeitures, changing the law of descent, etc. None of these specific limitations is claimed to be pertinent to this case.

As Judge Fahy pointed out in his dissenting opinion, there "can be no doubt" that the two Acts involved in this case come within the broad limits of the authority granted by Congress. "They deal with 'rightful subjects of legislation', their scope is 'within said District,' they are 'consistent with the Constitution of the United States',— a Constitution framed in the background of the principle that all men are created equal." (R. 101) Tested by the criteria enunciated by this Court, these Acts are plainly valid. They relate to the affairs of a particular locality. They do not purport to, and could not, have any application beyond the boundaries of the District of Columbia. They do not come within the scope of any subject of legislation, such as the regulation of interstate commerce, which is committed by the Constitution to Congress itself. They do not encroach on any subject of legislation which Congress in the Act of 1871 reserved for its own action.

On the basis of their conclusion that the Acts of 1872 and 1873 constituted "general" legislation, the four judges for whom Chief Judge Stephens wrote reached the further conclusion that the Acts were repealed by the District of Columbia Code of 1901, 31 Stat. 1189. Judge Prettyman, as an alternative ground for concurring in the result, stated that, if the Acts "were general legislation they were void from the beginning and in any event were repealed by the 1901 Code." (R. 99)

It is respectfully submitted that this conclusion as to the effect of the 1901 Code is erroneous. It should be emphasized, at the outset, that the 1901 Code did not specifically or expressly repeal these two Acts. On the contrary, the conclusion that the Acts were repealed is based upon certain general provisions of the Code. It is pertinent, therefore, to recall the admonition frequently made by this Court that "repeals by implication are not favored" and that the "intention of the legislature to repeal must be clear and manifest." *United States v. Borden Co.*, 308 U. S. 188, 198-199, and numerous authorities there cited.

Section 1636 of the 1901 Code, upon which the opinion of Chief Judge Stephens mainly relied, repealed "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia * * * in force in said District on the day of the passage of this act * * * except: * * *

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations."

The Acts of the Legislative Assembly were clearly saved from repeal by the language of Section 1636. Both of those enactments imposed duties upon subordinates of the Commissioners of the District of Columbia—the successors in office or duty of the Register and the attorneys of the District of Columbia. Both enactments were “police regulations,” as that term was defined by the Court of Appeals in *United States v. Cellā*, 37 App. D. C. 433, 435:

“A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character. While municipal ordinances or police regulations are binding upon the community affected by them, they do not emanate from the supreme power of the state, which is the exclusive source of all general legislation.”

See also *Johnson v. District of Columbia*, 30 App. D. C. 320, holding that an Act of the Legislative Assembly prohibiting cruelty to animals was a “mere police regulation” and hence saved from repeal under Section 1636 of the 1901 Code.

Both enactments in this case deal with the regulation of licensed public eating places, which Congress, by its enactments from the Act of May 3, 1802, 2 Stat. 195, to the present time, had committed to the regulatory authority of the local District governments. Both enactments related to municipal affairs only.

“‘Municipal’ has been defined to be that which belongs to a corporation or a city, and to include the rules or laws by which a particular district, community, or nation is governed. It may also mean, ‘local,’ ‘particular,’ ‘independent.’” 27 Words and Phrases, Perm. Ed. 735.

Section 1640 of the 1901 Code provided:

“Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia * * * of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.”

The enactments of the Legislative Assembly of 1872 and 1873 are neither inconsistent with nor replaced by any provision of the 1901 Code. Further, since these enactments are simply the ordinance of the Council of Washington of March 7, 1870, as modified by the Legislative Assembly—they “substantially paralleled” it (R. 85)—they were legalized and kept in force by Act of Congress up to the time of enactment of the 1901 Code. Section 91 of the Revised Statutes of the District of Columbia, approved June 22, 1874, provided:

“All laws and ordinances of the cities of Washington and Georgetown, respectively * * * not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force.”

Clearly, by enacting Section 1640 of the 1901 Code, Congress intended that such municipal ordinances as these enactments should remain in force until Congress itself modifies or repeals them. This Congress has never done.

Judge Prettyman's alternative ground, that the 1872 and 1873 Acts are no longer effective because they were abandoned through non-enforcement, is plainly without merit. It is elementary that “Failure to enforce the law does not change it.” *Louisville & N. R. Co. v. United States*, 282

U. S. 740, 759; *Kelly v. Washington*, 302 U. S. 1, 14; *Chicago B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 162.

CONCLUSION

In every locality in the United States except the District of Columbia, the question whether or not to prohibit racial discrimination in licensed public eating houses would be decided in the American way, by vote of the people. Here, in the District of Columbia, the views of the majority must be left to conjecture, for until Congress provides the means, the people of the District of Columbia are powerless to register their will. The effect of the decision of the United States Court of Appeals in this case is to make it impossible for Congress, until the Constitution is amended, to provide the means for the people of the District of Columbia to decide this or any other question for themselves.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.

CHESTER H. GRAY,
*Principal Assistant Corporation
Counsel, D. C.*

EDWARD A. BEARD,
*Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.*

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article 1, Section 8, Clause 17:

“The Congress shall have Power * * *

“To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—”

Acts of Congress

“AN ACT to provide a government for the District of Columbia”, approved February 21, 1871, 16 Stat. 419; District of Columbia Code, 1951, p. XLV:

“Sec. 5. *And be it further enacted*, That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. The assembly shall consist of a council and house of delegates. The council shall consist of eleven members, of whom two shall be residents of the city of Georgetown, and two residents of the county outside of the cities of Washington and Georgetown, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall have the qualification of voters as hereinafter prescribed, five of whom shall be first appointed for the term of one

year, and six for the period of two years, provided that all subsequent appointments shall be for the term of two years. The house of delegates shall consist of twenty-two members, possessing the same qualifications as prescribed for the members of the council, whose term of service shall continue one year. An apportionment shall be made, as nearly equal as practicable into eleven districts for the appointment of the council, and into twenty-two districts for the election of delegates, giving to each section of the District representation in the ratio of its population as nearly as may be. And the members of the council and of the house of delegates shall reside in and be inhabitants of the districts from which they are appointed or elected, respectively. For the purposes of the first election to be held under this act, the governor and judges of the supreme court of the District of Columbia shall designate the districts for members of the house of delegates, appoint a board of registration and persons to superintend the election and the returns thereof, prescribe the time, places, and manner of conducting such election, and make all needful rules and regulations for carrying into effect the provisions of the act not otherwise herein provided for: *Provided*, That the first election shall be held within sixty days from the passage of this act. In the first and all subsequent elections the persons having the highest number of legal votes for the house of delegates, respectively, shall be declared by the governor duly elected members of said house. In case two or more persons voted for shall have an equal number of votes for the same office, or if a vacancy shall occur in the house of delegates, the governor shall order a new election. And the persons thus appointed and elected to the legislative assembly shall meet at such time and at such place within the District as the governor shall appoint; but thereafter the time, place, and manner of holding and conducting all elections by the people, and the formation of the districts for members of the council and house of dele-

gates, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the legislative assembly: *Provided*, That no session in any one year shall exceed the term of sixty days, except the first session, which may continue one hundred days."

"Sec. 7. *And be it further enacted*, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the passage of this act, except such as are non compos mentis and persons convicted of infamous crimes, shall be entitled to vote at said election, in the election district or precinct in which he shall then reside, and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said District, and for all subsequent elections twelve months' prior residence shall be required to constitute a voter; but the legislative assembly shall have no right to abridge or limit the right of suffrage."

"Sec. 17. *And be it further enacted*, That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or

individual to the District or to any municipal corporation therein, nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency."

"Sec. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted,"

"Sec. 20. *And be it further enacted*, That the said legislative assembly shall not have power to pass any ex post facto law, nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax; in any one year, for all general objects, territorial and municipal, than two dollars on every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particular local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed

value of the property of said District, unless authorized by a vote of the people, as *hereinafter* [hereinbefore] provided."

"Sec. 40. *And be it further enacted*, That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. eighteen hundred and seventy-one, and all offices of said corporations abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall remain in full force until modified or repealed by Congress or the legislative assembly of said District; * * *."

Revised Statutes of the District of Columbia, approved June 22, 1874.

"Sec. 91. All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

Code of Law for the District of Columbia, approved March 3, 1901, 31 Stat. 1189.

"Sec. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British Statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of

the principles of equity or admiralty, or of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

Enactments of the Legislative Assembly

Act of the First Legislative Assembly approved August 23, 1871, Laws of the District of Columbia, Chap. LXIX, p. 87.

"An Act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia.

"Sec. 24. *And be it further enacted*, That all laws and ordinances of the corporations of Washington and Georgetown and the Levy Court, providing police regulations for the several businesses of the citizens of the District of Columbia, are hereby continued in force; and all acts and ordinances, or parts of the same, of the said corporations of Washington and Georgetown and the Levy Court and the District of Columbia, inconsistent with the provisions of this act, are hereby repealed; and whereas an emergency exists, this act shall go into effect immediately on and after its passage.

Act of the Second Legislative Assembly approved June 20, 1872, Laws of the District of Columbia, Chap. LI, p. 65.

"An Act regulating restaurants, and other public places, and for other purposes.

"Be it enacted by the Legislative Assembly of the District of Columbia, That keepers or owners of restaurants, eating-

houses, bar-rooms, or ice-cream saloons, or soda-fountains, at which food, refreshments or drinks are sold, or keepers of barber shops and bathing houses, must put in a conspicuous place in their restaurant, eating-houses, ice-cream saloons, or places for the sale of soda water, a scale of the prices for which the different articles they have for sale will be furnished.

Sec. 2. *And be it further enacted*, That persons violating the provisions of the above section are to be deemed guilty of misdemeanor, and, upon conviction in a court having jurisdiction, are to be fined by the court not less than twenty dollars, and not more than fifty dollars.

Sec. 3. *And be it further enacted*, That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

Act of the Third Legislative Assembly, approved June 26, 1873, Laws of the District of Columbia, Chap. XLVI, p. 116.

"An act regulating sales in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms, and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act.

"Be it enacted by the Legislative Assembly of the District of Columbia, That the proprietor or proprietors, or keeper or keepers, of every licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or establishment in the District of Columbia, shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms of his, her, or their restaurant, eating-house, bar-room, ice-cream saloon, or soda fountain room, and in one conspicuous place in each small or private room, if any, used in connection with said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room, for the accommodation of guests, visitors, or customers thereat, printed cards, or papers, on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly sold, or the price or prices for which the articles or things are or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof, and no greater price or prices than those mentioned or contained on said cards or printed papers shall be asked for, demanded, or received from any person or persons for any of the articles or things kept in any manner

for sale in any of the places or establishments aforesaid, either by said proprietor or proprietors, keeper or keepers, or by their agents, employes, or any one acting in any manner for them.

“Sec. 2. *And be it further enacted*, That on or before the first day of November in each year the proprietor or proprietors, keeper or keepers, of each licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room or establishment in said District, as aforesaid, shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale by him, her, or them, as aforesaid, which shall be filed by the Register in his office, and unless he is notified of changes therein, the copy transmitted and filed in said office may be used in any case or proceeding under this act as prima facie evidence of the common or usual prices charged for the articles or things mentioned therein by the proprietor or proprietors, keeper or keepers, of any of the places or establishments aforesaid, and in a failure of any proprietor or proprietors, keeper or keepers, to transmit the copy aforesaid, the Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him.

“Sec. 3. *And be it further enacted*, That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed

to eat or drink in said place or establishment: *Provided*, That persons of different sexes shall not be accommodated in the same room or rooms unless they accompany each other, or call for any articles or things together, or unless said room or rooms are ordinarily used indiscriminately by persons of both sexes.

Sec. 4. *And be it further enacted*, That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, shall neglect or refuse to put up printed cards or papers of prices as provided for in the first section of this act, or shall refuse to send a copy or duplicate to the Register, as provided in the second section, or shall place or cause to be placed on said card or paper, or permit to be placed thereon any price or prices other or greater than that for which any article or thing is, or may be, usually and commonly sold or furnished by him, her, or them, or different from or more than is usually or commonly demanded or received therefor by him, her, or them, or by his, her, or their authority or direction, or shall demand or receive in any manner, or under any circumstances, or for any reason or pretence, in person or by any employé or agent, from any person or persons aforesaid, any sum or prices different or greater than is contained on said cards or papers, or than is usually and commonly asked or received for any article or thing kept for sale as aforesaid, or shall refuse or neglect, in person or by his, her, or their employé or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the

room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: *Provided*, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

“Sec. 5. *And be it further enacted*, That all acts and parts of acts inconsistent herewith are hereby repealed.”

Corporation Laws of Washington, D. C.

“AN ACT to license, tax, and regulate Hotels, Taverns, Ordinaries, Restaurants, and Tippling-houses.

“Sec. 4. That every person who shall apply for a restaurant or eating-house license shall produce to the Mayor a certificate signed by the commissioner or person acting as commissioner of improvements and six respectable free-

holders residing in the same square, or the next adjacent square, or the square opposite to the one in which such person resides, which certificate shall set forth that the said commissioner or person acting as commissioner and each of the said six respectable freeholders have personally examined the premises for which application for a license is made, and that they are satisfied that the person making application hath provided on said premises suitable and proper accommodations for guests, so that said guests may be supplied with such eatables that they may require at any hour that the same may be called for."

"Sec. 10. That all keepers of hotels, taverns, ordinaries, and restaurants be, and they are hereby prohibited from selling spiritous and fermented liquors, wines, cordials, and all other intoxicating liquors to any minor; and all keepers of hotels, taverns, ordinaries, and restaurants, shall be, and are hereby prohibited from selling any kind of spiritous, distilled, or fermented liquors on Sunday, and they are hereby required to have their bars or other places where liquor is usually sold closed on Sunday during the entire day and evening; and for the first violation of any of the requirements of this section, the person or persons so offending shall be fined not less than twenty nor more than forty dollars, and for the second offence a like fine, and shall forfeit his, her, or their license, which shall be annulled by the Mayor." Approved October 31, 1864.

Corporation Laws of Washington, D. C., 12, Sixty-second Council, General Laws, Chap. 9, p. 8. (Reference No. +K859L, W2741, District of Columbia Public Library).

"An Act to regulate admission to, and accommodation in, licensed houses and places of amusement.

“Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington, That from and after the passage of this act it shall not be lawful for the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color.

“Sec. 2. And be it further enacted, That if the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, or any agent acting for him or them, shall violate or offend against the provisions of this act, he or they shall be subject to a fine of not less than fifty dollars for each violation thereof, to be recovered in an action of debt, in the name of the Mayor, Board of Aldermen, and Board of Common Council of the city, on information filed before any police magistrate.

“Sec. 3. And be it further enacted, That in lieu of the penalties provided in an ordinance entitled ‘An act regulating admission to places of public amusements,’ approved June 10, 1869, for the offense therein mentioned, the penalty mentioned in the second section of this act is hereby substituted, and hereafter shall be applicable to and enforced, as herein provided, for any violation of said act of June 10, 1869.

“Sec. 4. And be it further enacted, That after the final conviction of any party for the violation of any of the provisions of this act, or of that of June 10, 1869, referred to in the preceding section, and the recovery of the fine, a sum equal in amount to one-half of such fine shall be paid, and warrant drawn in the usual form out of the general fund, to the party who may have been the informer in any such case.

“Sec. 5. *And be it further enacted*, That all acts or parts of acts that are inconsistent with the provisions of this act are hereby repealed.” Approved March 7, 1870.

Corporation Laws of Washington, D. C., 13, Sixty-seventh Council, General Laws, Chap. 42, p. 22 (Reference No. +K859L, W2741, District of Columbia Public Library).

No. 617

IN THE
Supreme Court of the United States

October Term, 1952

DISTRICT OF COLUMBIA, *Petitioner,*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA
AND THE UNITED STATES

For the District of Columbia: For the United States:

VERNON E. WEST,
Corporation Counsel.

HERBERT BROWNELL, JR.,
Attorney General.

CHESTER H. GRAY,
*Principal Assistant
Corporation Counsel.*

ROBERT L. STERN,
*Acting Solicitor
General.*

PHILIP ELMAN,
*Special Assistant to
the Attorney General.*

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**REPLY BRIEF FOR THE DISTRICT OF COLUMBIA
AND THE UNITED STATES**

The ultimate issue in this case is whether the Acts of 1872 and 1873 enacted by the Legislative Assembly of the District of Columbia are now in effect. The Court of Appeals has held that they are not, and the chief reasons for review of the decision below are to be found in the broad grounds on which it was placed, principally that Congress cannot delegate local legislative authority to the District of Columbia.

Respondent deals with the question whether this is an appropriate case for certiorari as though the Court of Appeals had based its decision on the narrow ground that, solely as a matter of construction of the District of Columbia Code of 1901 (31 Stat. 1489), the Acts of 1872 and 1873 had been repealed, and that hence there was no necessity to

pass upon their validity. In fact, however, the Court of Appeals did not dispose of the case on so narrow a basis. On the contrary, the crucial ruling upon which the decision rests, and in which all of the judges comprising the majority concurred, is that Congress has no power under the Constitution to delegate local legislative authority to the District of Columbia.

This ruling upon what is, intrinsically and practically, an important question of constitutional law lies at the heart of the decision below. If unreviewed, it will stand as the authoritative determination of that question. The question cannot, of course, be litigated in another circuit; and in the District of Columbia Circuit its authority, as a decision of the full court sitting in banc, will not be questioned. If the decision below is left undisturbed, it will be the controlling judicial ruling upon the power of Congress to legislate for the District of Columbia, and Congress and the bar will undoubtedly so regard it.

Respondent in its brief in opposition, however, asserts that the District of Columbia and the United States, in requesting review of this constitutional determination by the Court of Appeals, are seeking an "advisory" opinion upon a "hypothetical" issue. Respondent seems to assume that the constitutional holding of the Court of Appeals (which bulks so large in the opinions below) had no effect whatsoever upon its decision, and that the question of repeal *vel non* under the 1901 Code was treated as wholly independent of, and separate from, the determination of the constitutional question. But even a casual reading of the opinions of Chief Judge Stephens and Judge Prettyman shows that the majority below regarded the two issues as interrelated. (See, esp., R. 85, 99.)¹

¹ After devoting more than 20 pages of his opinion to the "constitutional provisions and principles" bearing on the validity of the 1872 and 1873 Acts, and having reached the conclusion that the Acts were invalid "general legislation", Chief Judge Stephens stated that this conclusion "requires the further conclusion that they [the Acts] were repealed by the District of Columbia Code of 1901 . . ." (R. 85.) Judge Prettyman stated that if the Acts "were general legislation they were void from the beginning and in any event were repealed by the 1901 Code." (R. 99.)

Rule 38 (5) of the Rules of this Court sets forth some of the "special and important reasons" which may justify review on certiorari. Subparagraph (c) refers specifically to review of decisions of the Court of Appeals for the District of Columbia Circuit:

Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court.

It is respectfully submitted that, in the context in which this case was decided below and is presented here, the decision of the Court of Appeals restricting the constitutional power of Congress to delegate local legislative authority to the District of Columbia is neither "abstract" nor "hypothetical", and that there exist in this case the "special and important reasons" for review indicated by Rule 38 (5) (c).

Respectfully submitted,

For the District of Columbia: For the United States:

VERNON E. WEST,
Corporation Counsel.

HERBERT BROWNELL, JR.,
Attorney General.

CHESTER H. GRAY,
*Principal Assistant
Corporation Counsel.*

ROBERT L. STERN,
*Acting Solicitor
General.*

APRIL 1953.

PHILIP ELMAN,
*Special Assistant to
the Attorney General.*

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No. 617

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA,
Petitioner

v.

JOHN R. THOMPSON COMPANY, INC.,
Respondent

**On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit**

BRIEF FOR THE DISTRICT OF COLUMBIA

VERNON E. WEST,
Corporation Counsel, D. C.
CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

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Ordinances adopted by Council of City of Washington respecting
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Ordinance approved October 31, 1864 (App. 20)

Ordinance approved March 7, 1870 (App. 22) 7, 8, 10, 25, 30, 35

Miscellaneous:

No. XLIII, The Federalist

Encyclopedia Britannica "Restaurant" (14th Ed.)

Webster's New International Dictionary

A Bill, H.R. 5307, 82d Congress, 1st Session, introduced September 12, 1951, to repeal Acts of Legislative Assembly of 1872 and 1873.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA,
Petitioner

v.

JOHN R. THOMPSON COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinion of the Municipal Court (R. 4) is not reported. The opinion (R. 25), the concurring opinion (R. 37) and dissenting opinion (R. 52) of the Municipal Court of Appeals are reported at 81 A. 2d 249. The opinion (R. 60), the concurring opinion (R. 89) and dissenting opinion (R. 100) of the United States Court of Appeals have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered January 22, 1953 (R. 121). The petition for certiorari filed February 20, 1953, was granted April 6, 1953. Jurisdiction to issue the writ is conferred by Title 28, U. S. Code, Sec. 1254 (1).

STATEMENT OF THE CASE

By "An Act to Provide a Government for the District of Columbia," approved February 21, 1871, 16 Stat. 419, Congress provided a territorial form of government for the territory of the United States within the limits of the District of Columbia. By that Act Congress constituted that government a "body corporate for municipal purposes," and provided in Section 5 thereof

"That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. * * *"

Section 18 provided:

"Sec. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

The Legislative Assembly enacted "*An Act regulating restaurants, and other public places, and for other purposes*," approved June 20, 1872, Laws of the District of Columbia, Ch. LI (App. 12), and "*An Act regulating sales*

in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms, and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act," approved June 26, 1873, Laws of the District of Columbia, Ch. XLVI (App. 13). Subsequent to 1873 these Acts of the Legislative Assembly were not enforced. (See opinion of Judge Clagett, footnotes 4 and 5, R. 41, 42). The provisions of the Act of February 21, 1871, providing an executive and a legislative assembly for the District of Columbia were repealed by the Temporary Organic Act of 1874, approved June 20, 1874, 18 Stat. 116.

On August 1, 1950, the Corporation Counsel of the District of Columbia filed in the Municipal Court for the District an information (No. 111019; R. 1) charging John R. Thompson Company, Inc., as a restaurant keeper in the District, with violation of the Acts of the Legislative Assembly of 1872 and 1873—by refusal of service, solely because they were members of the Negro race, to named well-behaved and respectable persons. The information was in four counts, the first charging violation of the Act of 1872, the second, third and fourth with violation of the Act of 1873 (R. 1-3). The Municipal Court, by Judge Frank H. Myers, *sua sponte*, entered an order quashing the information without arraigning the defendant (R. 22) on the ground that the said Acts of the Legislative Assembly had been held by him in an earlier prosecution against the same defendant (No. 99150), alleging similar violations on a different date (R. 17), to have been repealed by implication by the Organic Act of June 11, 1878 (R. 4). The District of Columbia took an appeal from that order to the Municipal Court of Appeals (R. 19).

The Municipal Court of Appeals, as to the first count of the information, affirmed the order of the Municipal Court, Judge Hood being of the view that both the 1872 and 1873 enactments were invalid as beyond the power of the Legislative Assembly (R. 52), Judge Clagett thinking that the 1872 enactment was repealed by the enactment of 1873 "at least so far as restaurants are concerned" (R. 48). As to the second, third and fourth counts of the information, the Municipal Court of Appeals reversed the order of the Municipal Court, Judge Clagett being of the opinion that the 1873 enactment was valid when enacted (R. 47) and that it had never been repealed (R. 52), and Chief Judge Cayton being of the view that both the 1872 and 1873 enactments were valid when enacted (R. 32) and that both were presently enforceable (R. 32-36).

The Thompson Company petitioned the United States Court of Appeals for the District of Columbia Circuit for the allowance of an appeal from the judgment of the Municipal Court of Appeals in so far as it reversed the order of the Municipal Court quashing the information as to the second, third and fourth counts. The District, on its part, petitioned for the allowance of a cross-appeal from the judgment of the Municipal Court of Appeals in so far as it affirmed the order of the Municipal Court in quashing the information as to the first count. The United States Court of Appeals granted both petitions (R. 56), ordered the two appeals consolidated (R. 57) and *sua sponte* ordered the appeal and the cross-appeal heard in banc (R. 58).

The United States Court of Appeals, by a divided Court, affirmed the judgment of the Municipal Court of Appeals as to the first count of the information and reversed the judgment as to the second, third and fourth counts. Chief Judge Stephens and Judge Clark, Judge Miller and Judge Proctor held that the enactments of the Legislative Assembly were of the character of general legislation, the power to enact which the Congress could not constitutionally dele-

gate to the Legislative Assembly, and that the said Acts were repealed by the 1901 Code (R. 85); Judge Prettyman thought it "unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances" but concurred in the judgment announced by Chief Judge Stephens. His view was "If they (the Acts of 1872 and 1873) were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority which originally adopted them" (R. 99). Judge Miller concurred "in the opinion of Chief Judge Stephens, but if the view that the enactments are regulatory ordinances were accepted," he agreed with what is said in Judge Prettyman's opinion (R. 100). Judge Fahy, Judge Edgerton, Judge Bazelon and Judge Washington dissented on the grounds that the Acts of the Legislative Assembly were local municipal ordinances (R. 102), lawfully adopted under a valid delegation of authority by Congress, and that the Acts of the Legislative Assembly have not been repealed and are presently enforceable (R. 100).

QUESTIONS PRESENTED

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two laws which made it a penal offense for the owner of a restaurant in the District of Columbia to refuse service to a person on account of race or color. The Court of Appeals for the District of Columbia Circuit has held that these Acts are "presently unenforceable" (R. 89). The questions presented are:

1. Whether Congress has power under the Constitution to delegate to the District of Columbia authority to enact local anti-discrimination legislation such as the Acts of 1872 and 1873.

2. If Question 1 is answered in the affirmative, whether the

Organic Act of 1871 constituted a delegation of such legislative authority to the Legislative Assembly of the District of Columbia; and whether the Acts of 1872 and 1873 were proper exercises by the Legislative Assembly of the authority granted it in the Organic Act of 1871.

3. If the Acts of 1872 and 1873 are held to have been valid when enacted, whether they are no longer enforceable as having been repealed or "abandoned."

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia Circuit erred

(1) In holding that the information could not be validly prosecuted;

(2) In holding that Congress did not have constitutional authority to delegate power to the Legislative Assembly to enact the Acts in question;

(3) In holding that Congress in the Act of 1871 did not effectively and constitutionally delegate to the Legislative Assembly authority to enact the Acts of 1872 and 1873;

(4) In holding that the Acts of the Legislative Assembly are presently unenforceable either because they were repealed or "abandoned";

(5) In holding that the Acts of the Legislative Assembly were invalid when enacted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are printed in the Appendix, *infra*, pp. 1-23.

SUMMARY OF ARGUMENT

The purpose of the Founders in vesting in Congress exclusive legislative authority over the District of Columbia was

to exclude the States from participation in the government of the capital city. But the Founders did not intend to burden Congress with the management of the purely local affairs of the District of Columbia. They assumed that Congress would provide a municipal legislature for local purposes to perform that function.

Upon assuming control of the District of Columbia, Congress continued the then existing City of Georgetown, created a municipal corporation to govern the City of Washington, and authorized the Levy Court to govern the area of the District beyond the boundaries of the two cities. From time to time, in its discretion, Congress enlarged the powers of these municipal governments.

Beginning in 1862, Congress, in the exercise of its exclusive legislative authority over the District of Columbia, determined as its legislative policy that Negroes in the District of Columbia were entitled to full rights of citizenship. By successive enactments, Congress abolished slavery in the District, made Negroes amenable to the same laws as white persons, gave Negroes the right to ride on street cars, and gave qualified Negroes the right to vote at any election in the District of Columbia. On the National level, Congress proposed the 13th Amendment of the Constitution to abolish slavery and the 14th Amendment of the Constitution to give Negroes born or naturalized in the United States the status of citizens of the United States, and those Amendments were adopted.

The Council of the City of Washington, in conformity with the legislative policy of Congress, adopted an ordinance on March 7, 1870 which made it unlawful for proprietors of restaurants and other specified establishments to refuse service to or to exclude any orderly person on account of race or color.

By the Act approved February 21, 1871 Congress abolished the three municipal corporations in the District of Columbia and created a new, single municipal corporation

to govern the entire District of Columbia. To the Legislative Assembly created by that Act Congress delegated legislative authority, employing the language it had used in delegating such authority to the Assemblies of the Territories.

In conformity with the legislative policy which Congress had formulated, the Legislative Assembly enacted the Acts of 1872 and 1873 here in question, making it unlawful for proprietors of restaurants and other establishments to discriminate against Negroes on account of race. The Court of Appeals held that those enactments were of the character of "general legislation," power to enact which Congress could not constitutionally, and did not, delegate to the Legislative Assembly, and that this conclusion required the further conclusion that the Acts of the Legislative Assembly were repealed by the 1901 Code of Law for the District of Columbia.

It is respectfully submitted that both conclusions of the Court of Appeals were erroneous. Under the decisions of this Court, the regulation of private rights, such as the right to patronize an inn or restaurant, is a matter for municipal legislation by the States, and in the District of Columbia is subject to the plenary legislative power of Congress. In the case of the District of Columbia, as in the Territories, Congress can constitutionally delegate to a subordinate legislature as much or as little municipal legislative authority as it sees fit.

Congress unquestionably delegated authority to the Legislative Assembly to enact the two Acts in question. By Section 40 of the Act approved February 21, 1871 Congress provided that the municipal ordinances which had been adopted by the City of Washington should remain in force "until modified or repealed by Congress or the Legislative Assembly of said District." By this provision the ordinance adopted by the Council of Washington on March 7, 1870, which the Court of Appeals noted was "substantially

paralleled" by the Acts of 1872 and 1873, was kept in force and the Legislative Assembly was given authority to enact legislation of that character.

• The enactments of the Legislative Assembly did not, as the Court of Appeals concluded, alter the common law. Restaurants were unknown to the common law. The common law predecessors of the restaurant were known as ordinaries and were open to all comers. Congress, however, had materially altered the common law by elevating Negroes to the status of citizens, of people, of members of the public. The enactments of the Legislative Assembly in fact required restaurants to conform with the common law practices of ordinaries by entertaining the public, as that term had been re-defined by the Congressional policy. In any event, the authority which Congress had vested in the Legislative Assembly was sufficient to empower it to alter the common law.

By Section 91 of the Revised Statutes of the District of Columbia Congress in 1874 again kept in force the ordinances of the City of Washington, but as modified by the Legislative Assembly. In 1874 Congress abolished the Territorial government of the District of Columbia and created in lieu thereof the temporary commission form of government, which it made permanent by the Act approved June 11, 1878. By these last mentioned Acts Congress withdrew from the municipal government all legislative authority, and did not grant legislative power to the Commissioners of the District of Columbia until 1892. Between 1892 and 1901 neither Congress nor the Commissioners of the District of Columbia repealed the Acts of the Legislative Assembly, and they therefore were in force at the time of enactment of the District of Columbia Code of Law of 1901.

The 1901 Code did not repeal the enactments. Section 1636 excepted from repeal Acts of the Legislative Assembly relating to the duties of the Commissioners of the District

of Columbia or their subordinates, and the Acts of 1872 and 1873 imposed duties on the Commissioners, as successors in authority of the Governor of the District of Columbia, and upon the successors in authority of the Register and attorney of the District of Columbia. That section also excepted acts relating to municipal affairs only, and as is demonstrated above, the Acts of 1872 and 1873 were of that character. Section 1640 of the 1901 Code excepted from repeal and kept in force municipal ordinances. The enactments of 1872 and 1873 were nothing more than the ordinance of March 7, 1870, as modified by the Legislative Assembly, and they did not rise to a higher degree of legislative enactment by having been adopted by a city council called a Legislative Assembly. The effect of Section 1640 of the 1901 Code was to keep those enactments in force until Congress itself modifies or repeals them, and this Congress has not done.

ARGUMENT.

1. Congress Could Constitutionally Delegate to the Legislative Assembly Power to Enact the Acts of 1872 and 1873

To determine whether or not the information in this case can be validly prosecuted, two preliminary questions must be answered. As stated by the Court of Appeals, those questions are:

“* * * The first, were the enactments of the Legislative Assembly of 1872 and 1873 on which the information against the Thompson Company was based within the power of the Assembly; the second, were those enactments repealed.” (R. 65)

The Court of Appeals answered the first question by holding (R. 79):

“* * * the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of ‘general legislation,’ the power to enact which the Congress could not constitu-

tionally, and did not, delegate to the Legislative Assembly",

and the second by holding (R. 85) that

"The conclusion reached in the previous topic that the enactments of the Legislative Assembly of 1872 and 1873 are of the character of general legislation requires the further conclusion that they were repealed by the District of Columbia Code of 1901, Act of March 3, 1901. 31 Stat. 1189."

It is respectfully submitted that, in the light of applicable decisions of this Court which were not considered by the Court of Appeals, its first conclusion, and therefore, necessarily, its second, were erroneous.

Article I, Section 8, Clause 17, of the Constitution of the United States, specifically empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

In *O'Donoghue v. United States*, 289 U. S. 516, 538, in holding that the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, the Court contrasted the District clause of the Constitution with the Territorial clause, Art. IV, § 3, cl. 2, and said:

"In the District clause, unlike the Territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain--the landed estates of the sovereign--within which transitory governments to tide over the periods of pupillage may be constituted, but an *unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental.* The District is not an 'ephemeral' subdivision of the 'outlying dominion of the

United States,' but the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states, and for a future immeasurable beyond the prophetic vision of those who designed and created it." (Emphasis supplied.)

The Court quoted with approval from the opinion of Circuit Judge, later Mr. Chief Justice, Taft in *Grether v. Wright*, 75 Fed. 742, 756-757:

" 'It was meet that so powerful a sovereignty should have a local habitation the character of which it might absolutely control, and the government of which it should not share with the states * * * ' "

But while the Founders intended that Congress should not share control of the District of Columbia with the States, they never intended that Congress should be burdened, and its time and attention diverted from National affairs, by the management of the purely local affairs of the District of Columbia. Instead, they assumed that Congress would provide the means for the inhabitants of the ceded territory to perform this function. In No. XLIII of *The Federalist* (R. 37, 38), James Madison, in explaining the provisions of Article 1, Sec. 8, cl. 17 of the Constitution, said:

" 'The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the in-

habitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.' " (Emphasis supplied.)

Mr. Madison's assumption that a municipal legislature for local purposes would be allowed the people of the District of Columbia proved to be correct. Shortly after the Government was established in Washington, Congress, by the Act approved May 3, 1802, provided such a government, and from time to time thereafter until 1874, enlarged the powers and authorities granted it. In *Metropolitan Railroad Company v. District of Columbia*, 132 U.S. 1, 4-7, this Court reviewed Congressional enactments providing such municipal governments for the people of the District, as follows:

"On May 3d, 1802, an Act was passed to incorporate the City of Washington. (2 Stat. at L. 195.) It invested the mayor and common council (the latter being elected by the white male inhabitants) with all the usual powers of municipal bodies, such as the power to pass by-laws and ordinances; powers of administration, regulation and taxation; * * *. Various amendments, from time to time, were made to this charter, and additional powers were conferred. A general revision of it was made by Act of Congress passed May 15, 1820. (3 Stat. at L. 583.) A further revision was made and additional powers were given by the Act of May 17, 1848 (9 Stat. at L. 223), but nothing to change the essential character of the corporation.

* * * * *

"In 1871 an important modification was made in the form of the district government—a Legislature was established, with all the apparatus of a ^{municipal} government. By the Act of February 21st, of that year, entitled 'An Act to Provide a Government for the District of Columbia' (16 Stat. at L. 419), it was enacted (§ 1) that all that part of the territory of the United States included within the limits of the District of Columbia be

created into a government by the name of the District of Columbia, by which name it was constituted 'a *body corporate for municipal purposes*,' with power to make contracts, sue and be sued, and 'to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States.' A governor and Legislature were created; also a board of public works; * * * * . The acts of this board were held to be binding on the municipality of the District in *Barnes v. District of Columbia*, 91 U.S. 540. It was regarded as a mere branch of the district government, though appointed by the President and not subject to the control of the district authorities.

"This Constitution lasted until June 20th, 1874, when an Act was passed entitled 'An Act for the Government of the District of Columbia, and for Other Purposes.' (18 Stat. at L. 116.) * *"

The extent of the power of Congress to delegate authority to the municipal government of the District of Columbia was indicated by this Court in *Barnes v. District of Columbia*, 91 U. S. 540. In that case, in holding the District of Columbia liable for acts and omissions of the Board of Public Works created by the same Act which created the Legislative Assembly, this Court said (p. 544):

"A municipal corporation, in the exercise of all its duties, including those most strictly local or internal; is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

In *Metropolitan Railroad Company v. District of Columbia*, 132 U. S. 1, 8, *supra*; this Court again stated the rule that the extent and scope of local legislative power which may be delegated to a municipal government are within the wisdom of the superior Legislature:

“All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion.”

The case of *Stoutenburgh v. Hennick*, 129 U. S. 141, on which the Court of Appeals relied, defined the class of powers which Congress may not delegate. The question presented in that case was whether a section of an Act of the Legislative Assembly which required commercial agents offering merchandise for sale by sample in the District to obtain a license so to do was a valid law when applied to persons soliciting the sale of goods on behalf of firms doing business outside the District. In holding that section of the Act of the Assembly invalid, the Court first stated fundamental principles (p. 147):

“It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

“Congress has express power ‘to exercise exclusive

legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State Government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers; and this is all that Congress attempted to do."

The Court then applied those principles to the question presented. Referring to earlier precedents dealing with the scope of the commerce clause, e.g., *Robbins v. Shelby County Taxing District*, 120 U. S. 489, the Court reaffirmed the exclusive power of Congress over "that class of subjects which calls for uniform rules and national legislation", as distinguished from "that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively" (citing *Cooley v. Phila. Board of Wardens*, 12 How. 299; and *Gilman v. Philadelphia*, 3 Wall. 713). Declaring that that section of the Act of the Legislative Assembly was " * * a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District" the Court held:

"In our judgment Congress for the reasons given could not have delegated the power to enact the third clause of the 21st section of the Act of Assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, * *"

Chief Judge Stephens stated (R. 79):

"It is correctly suggested in *Roach v. Van Riswick*, that, for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may there-

fore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty."

The Court of Appeals did not define "municipal powers" and did not consider the decisions of this Court in *City of New York v. Miln*, 11 Pet. 102, *United States v. Cruikshank*, 92 U. S. 542 and the *Civil Rights Cases*, 109 U. S. 3, in which this Court defined "municipal legislation" and "municipal regulation".

In *City of New York v. Miln*, 36 U. S. 11 Pet. 102, 139, in holding that a statute of New York requiring the master of every vessel arriving at the port of New York to make a written report concerning every person brought as a passenger is not a regulation of commerce but of police, and within the powers belonging to the States, this Court defined "municipal legislation" as follows:

"* * * a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

In *United States v. Cruikshank*, 92 U. S. 542, 553, the Court, referring to the Second Amendment of the Constitu-

tion, adopted the definition of "municipal legislation" stated in *City of New York v. Miln*, supra, as follows:

"This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *City of N. Y. v. Miln*, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."

In the *Civil Rights Cases*, 109 U. S. 3, 12, 19, the Court inferentially adopted the definition of "municipal legislation" made in *City of New York v. Miln*, by citing with approval the *Cruikshank* case. Two of the cases decided by this Court in the *Civil Rights Cases* were indictments charging denial to persons of color the accommodations of an inn or hotel in violation of the 1st and 2d sections of the Civil Rights Act approved March 1, 1875, 18 Stat. 335. In holding that those sections of the Act were unconstitutional and void as not being authorized either by the 13th or the 14th Amendment of the Constitution, the Court held respecting the 14th Amendment:

"It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect

of the Amendment may be found in *U. S. v. Cruikshank*, 92 U. S., 542; * * *

and at page 19:

"We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. * * *

In *Binns v. United States*, 194 U. S. 486, 491, this Court emphasized that the Territories and the District of Columbia are subject to the plenary legislation of Congress in every branch of municipal regulation. In affirming a conviction under an Alaska penal statute, the Court said:

"It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a *quasi* state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory. *It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District.*

In *Butts v. Merchants & Miners Transportation Co.*, 230 U. S. 126, the Court rejected the contention that although unconstitutional and void in their application to the States; Sections 1 and 2 of the Civil Rights Act of March 1, 1875, 18 Stat. 335, are valid and effective in all other places within the jurisdiction of the United States, including the District of Columbia. The Court held: "Here it is not possible to separate that which is constitutional from that which is not. * * * They must therefore be adjudged altogether invalid."

It may intrust to them a large volume of legislative power, or it may, by direct legislation, create the whole body of statutory law applicable thereto." (Emphasis supplied.)

There can be no question that Congress can constitutionally delegate municipal power to the fullest extent to the territories of the United States, for in *Simms v. Simms*, 175 U. S. 162, 168, this Court held:

"In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory. *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548, and cases cited; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. ed. 498, 500, 19 Sup. Ct. Rep. 183. In the exercise of this power, Congress has enacted that (with certain restrictions not affecting this case) 'the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.' Rev. Stat. § 1851; act of July 30, 1886, chap. 818, 24 Stat. at L. 170. The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a state, are regulated by the laws of the state only. *Cope v. Cope*, 137 U. S. 682, 684, 34 L. ed. 832, 11 Sup. Ct. Rep. 222."

In the cases of *City of New York v. Miln*, *United States v. Cruikshank* and the *Civil Rights Cases*, this Court used the terms "municipal legislation" and "municipal regulation" to differentiate the powers retained by the States from those surrendered or restrained by the Constitution. In the *Stoutenburgh* case, this Court used the term "municipal powers" to differentiate the powers possessed by Congress as the repository of the powers of a State government over

the District of Columbia from those possessed by Congress as the general or central government.

Clearly, then, the *Stoutenburgh* case does not support the conclusion of the Court of Appeals that Congress could not constitutionally delegate to the Legislative Assembly authority to enact the two Acts here in question. Enactment of such legislation for the District of Columbia is within the plenary power of Congress to legislate on every phase of municipal regulation. *Civil Rights Cases*, supra. Congress therefore could intrust to the Legislative Assembly of the District of Columbia, as it could intrust to the Legislative Assembly of a Territory, authority to enact those Acts or any other municipal legislation, as in its sole discretion is wise and proper. *Binns v. United States*, supra; *Simms v. Simms*, supra.

Chief Judge Stephens said (R. 81):

“The enactments are in the nature of civil rights legislation. They undertake to establish in the restaurant business, and in the other businesses named, a policy of equal service without respect to race or color, and to enforce that policy by a fine and license forfeiture.”

In *Yakus v. United States*, 321 U.S. 414, 424, this Court held:

“The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . .”

In the decade preceding creation of the Legislative Assembly Congress had determined the legislative policy by changing the status of the Negro, first in the District of Columbia, and later in the United States. By successive Acts Congress abolished slavery in the District of Columbia;² made Negroes amenable to the same laws and ordinances to

² Act approved April 16, 1862, 12 Stat. 376 (App. 4).

which free white persons were subject³; gave Negroes the right to ride on street cars in the District of Columbia⁴; gave Negroes the right to vote at any election in the District⁵; proposed the 13th Amendment to the Constitution to abolish slavery throughout the United States⁶; and proposed the 14th Amendment to the Constitution.

In *United States v. Wong Kim Ark*, 169 U.S. 649, 675, this Court, after referring to the Civil Rights Act of 1866 (14 Stat. 27) and to the Thirty-ninth Congress which enacted it, said of the 14th Amendment to the Constitution:

"The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the 14th Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several states; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of states. 14 Stat. at L. 358; 15 Stat. at L. 708. * * * Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford* (1857) 60 U.S. 19 How. 393, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States."

In the light of these Congressional enactments and constitutional amendments, it is clear that the Legislative Assembly in enacting the two Acts here in question merely implemented the legislative policy which Congress had formulated.

³ Act approved May 21, 1862, 12 Stat. 407 (App. 5).

⁴ Act approved March 3, 1865, 13 Stat. 536 (App. 5).

⁵ Act approved January 8, 1867, 14 Stat. 375 (App. 5).

⁶ Resolution approved February 1, 1865, 13 Stat. 567; adopted December 18, 1865, 13 Stat. 774.

In his dissenting opinion Judge Fahy said (R. 101, 102):

“There can be no question Congress could constitutionally delegate to the Legislative Assembly power to enact regulations of a municipal or local character.”

and demonstrated that the Acts of 1872 and 1873 are of that class:

“They regulate a local activity, the serving of food at a fixed location within the District. This is the sort of thing which in the several states, unless there is state-wide law to the contrary, is appropriately left to municipal authority. This is so not merely because the law applies only to a local area; it is local by other standards as well. Such a regulation is one which the immediate governing body of a municipality, a city council for example, is likely to make its own concern. Higher authority, either a state legislature or, as here, Congress, may legislate upon the subject, but until it does local initiative may deal with it in accordance with the local point of view as to what is conducive to the peace, order, morals, or welfare of the community.

“Under this approach it seems plain the equal service provisions must be considered municipal or local. They represent the views of the Legislative Assembly as to how this matter should be regulated within the District of Columbia. They do not affect the general criminal law, or the descent or other disposition of property, or domestic relations, or the law of contracts or of torts, or interstate commerce, or any other matter commonly regulated by general law, but the serving of persons in licensed eating places in the local community. There is no necessity that eating places should be subject to identical regulations in all the cities of any one state. To hold that a municipality is not competent to regulate the subject would create a serious gap in the power of a community to govern itself in a matter of local concern.”

The District of Columbia adopts as its own and incorporates herein by reference the arguments, authorities and citations

of municipal regulations in Judge Fahy's opinion (R. 102-120).

On the basis of all of the foregoing, it is submitted that Congress could constitutionally delegate to the Legislative Assembly power to enact the Acts of 1872 and 1873.

2. Congress Did Delegate to the Legislative Assembly Authority to Enact the Acts of 1872 and 1873

From the very beginning, Congress delegated to the municipal government of the District of Columbia authority to regulate ordinaries,⁷ as public eating and drinking establishments were then known. By successive Acts, Congress authorized the Councils of the City of Washington " * * to provide for licensing and regulating * * retailers or liquors, * * "; " * * to license and regulate, exclusively * * ordinary keepers * * "; " * * to provide for licensing, taxing, and regulating * * ordinaries and taverns * * " ¹⁰. This regulatory authority was continued in force for the term of twenty years "or until Congress shall by law determine otherwise" by the Act approved May 17, 1848 (App. 4), and was in force at the time of creation of the Legislative Assembly.

In the exercise of that authority, the Council of the City

⁷ "The 'Ordinary.'—The earliest predecessors in England of the modern restaurant were the old coffee-houses and taverns which had a daily 'ordinary'—a mid-day dinner or supper, generally noted for a particular dish, and served at a common table at a fixed price and time. Some of the more ancient of these arose in the middle of the 17th century.

"Reference to the 'ordinaries' may be found as long ago as 1577 (Holinshed). In the 17th century the more expensive ordinaries were frequented by men of fashion, and gambling usually followed, so that the term 'ordinary,' by which was understood either the establishment or the meal was then more synonymous with the gambling house than the tavern. * * *

"The early American eating places were patterned after the inns, taverns and coffee houses in England and on the Continent. * * *

Encyclopedia Britannica "Restaurant" (14th Ed.).

⁸ Act approved May 3, 1802 (App. 2).

⁹ Act approved February 24, 1804 (App. 3).

¹⁰ Act approved May 15, 1820 (App. 4).

of Washington adopted ordinances regulating every phase of the business of ordinaries and taverns (App. 17-23), including the prohibition of the sale of liquor to Negroes between sunset and sunrise (App. 19).

On March 7, 1870, in conformity with the legislative policy formulated by Congress, *supra*, the 67th Council of the City of Washington adopted an ordinance (App. 22) which made it unlawful for the proprietors of restaurants and other specified establishments

“* * to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color.”

By Section 40 of the Act approved February 21, 1871, creating the Legislative Assembly, Congress provided:

“That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. eighteen hundred and seventy-one, and all offices of said corporations abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall remain in full force until modified or repealed by Congress or the legislative assembly of said District; * * *.”

Among the ordinances kept in force by this provision was the ordinance approved March 7, 1870, which, as Chief Judge Stephens noted (R. 85), was “substantially paralleled” by the enactments of the Legislative Assembly of 1872 and 1873.

The necessary effect of the action of Congress in keeping in force this ordinance of March 7, 1870, the only purpose of which was to declare the private right of Negroes to patronize restaurants and other establishments, and at the same time authorizing the Legislative Assembly to modify that ordinance, was to delegate to the Legislative Assembly

specific authority to enact legislation of the type and character of the Acts of 1872 and 1873.

3. The Enactments of the Legislative Assembly of 1872 and 1873 Did Not Alter the Common Law

In his opinion Chief Judge Stephens said of the Acts of the Legislative Assembly (R. 79):

“In requiring restaurant keepers, upon pain of fine and license forfeiture, to serve any respectable, well-behaved person without regard to race, color, or previous condition of servitude, the enactments limit the freedom of the restaurant keeper in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling. Before the enactments, he could choose customers according to his own business or personal desire. The enactments lift restaurant keeping, theretofore strictly a private enterprise, to the level of a ‘public employment’ — thereby altering the common law, which required inns, but not restaurants, to serve all travellers.”

It is submitted that this conclusion is erroneous, but if the common law was altered by the enactments of the Legislative Assembly Congress had authorized the Legislative Assembly to make such alteration.

First, the common law imposed no requirements upon restaurant keepers, for the reason that neither the word nor the establishment “restaurant” was known to the common law. In 1882, in *Lewis v. Hitchcock*, 10 Fed. 4, 6, in sustaining a demurrer to a complaint in an action to recover a penalty under the Civil Rights Act of March 1, 1875, (prior to the decision of this Court in the *Civil Rights Cases*, supra) the District Court for the Southern District of New York held:

“The term ‘restaurant’ has no definite legal meaning. In Webster’s Dictionary it is not even recognized as a word yet Anglicized. As currently understood it doubtless means only, or chiefly, an eating-house.”

Both the Council of the City of Washington and the Legislative Assembly regarded "restaurant" and "eating house" as synonymous terms. By the ordinance approved October 31, 1864, the Council of the City of Washington first recognized the existence of "restaurants" and imposed identical requirements on restaurants and eating houses. The first definition locally of "restaurant" is found in the Act of the Legislative Assembly approved August 23, 1871 (App. 12). Sec. 21, Par. Fortieth provided:

"Every place, the business of which is to provide meals and refreshments, except distilled or fermented liquors, wines, and cordials, for casual visitors, shall be regarded as a restaurant or eating-house."

As was noted above, the common law predecessor of the restaurant was known as an "ordinary". The characteristics of an ordinary were stated by the Supreme Court of Appeals of Virginia in the case of *Talbott v. Southern Seminary*, 131 Va. 576 109 S.E. 440, which was cited by that Court in the case of *Alpaugh v. Wolverton*, 184 Va. 943, 36 S.E. 2d 906, on which the majority of the United States Court of Appeals relied. In the *Talbott* case the Supreme Court of Appeals of Virginia, referring to a Virginia statute giving proprietors of inns and boarding-houses liens upon property of guests, enacted in 1879, contrasted boarding-houses with other establishments, and said of the ordinary (p. 441):

"For many years prior to the first enactment, the term 'ordinary' had a well-defined meaning in this state. It was used to designate a public house where food and lodging were furnished to the traveler and his beast, at fixed rates, open to whoever might apply for accommodation, and where intoxicating liquor was sold by retail. It was a house of public entertainment and a common designation of it was a 'tavern'. *** In contrast with this house of public entertainment, usually designated a tavern or hotel, there was also what was known as a boarding house, which was a place of

private entertainment, where special contracts were usually made for a definite time, and the two terms 'boarding house' and 'private entertainment' were often used interchangeably to mean the same thing."

Examination of the ordinances adopted by the Council of the City of Washington respecting ordinaries and taverns (App. 17-23) shows that the local ordinaries were similar to those described by the Supreme Court of Appeals of Virginia.

Webster's New International Dictionary defines "ordinary" as "a meal served to all comers at a fixed price."

From the foregoing it is clear that the common law counterparts of the restaurant were in fact public employments, catering to "whoever might apply for accommodations" (*Talbot v. Southern Seminary*, supra) and to "all comers" (Webster). The only contracts entered into by the proprietors of such establishments with their customers were implied from the fact that the customer applied for the accommodation at the price fixed by the proprietor. The Court of Appeals reached its conclusion by applying to restaurants a principle of the common law applicable to boarding-houses.

Second, it was the common law definition of the "public", which might patronize public eating and drinking establishments, rather than the common law of "restaurants" which was modified, and the alteration of the common law was effected by Congressional legislation and constitutional amendment. In *Dred Scott v. Sandford*, 19 How. 393, 407, Mr. Chief Justice Taney referred to "the people or citizens of a State" as synonymous terms. The effect of the 14th Amendment was not only to elevate the Negro to the status of citizen, but to the status of "people", and therefore, to membership in the "public", which Webster defines as "of or pertaining to the people." The enactments of the Legislative Assembly in effect recognized the changed status of the Negro, and far from altering the common law of

"restaurants", required restaurant keepers to conform to the traditional business practices of their common law predecessors, i.e., to accommodate the public; as that term had been re-defined by constitutional amendments and Congressional enactments.

Third, as this Court pointed out in the *Civil Rights Cases*, 109 U. S. 3, supra, the private right to patronize a restaurant is one to be protected by municipal law. It is the duty of the municipal legislature to provide for the general welfare "by any and every act of legislation which it may deem to be conducive" to that end. *City of New York v. Miln*, 11 Pet. 102, 139, supra. As we have shown, Congress delegated to the Legislative Assembly authority to enact legislation of the character of the Acts of 1872 and 1873, and that grant of authority necessarily included power to alter the common law.

4. Congress Approved and Legalized the Acts of the Legislative Assembly of 1872 and 1873

In the absence of Congressional action, it could reasonably be inferred that Congress approved the Acts of the Legislative Assembly of 1872 and 1873. Section 4 of the Act approved February 21, 1871 (App. 6) provided "That there shall be appointed by the President, by and with the advice and consent of the Senate, a secretary of said District **; he shall record and preserve all laws and proceedings of the legislative assembly **; he shall transmit ** semiannually ** four copies of the laws to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress***". Sec. 18 of the Act of February 21, 1871 (App. 8) delegated legislative power to the Legislative Assembly, subject to the reservation, "***but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States***".

In *Clinton v. Engelbrecht*, 80 U.S. 13 Wall. 434, 446, the

Court in holding that the law of the territorial legislature of the Territory of Utah, prescribing the mode of obtaining panels of grand and petit jurors was obligatory upon the district courts of the territory, said:

“In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.”

Again in *Tiaco v. Forbes*, 228 U.S. 549, 557, the Court expressed the same thought. In that case Mr. Justice Holmes, speaking for the Court and referring to an Act of the Philippine Legislature of April 19, 1910, said:

“By §86 of the Act of July 1, 1902, all laws passed by the Philippine Government are to be reported to Congress, which reserves power to annul them. It is worthy of mention that the law under consideration was reported to Congress and has not been annulled.”

But the approval and legalization by Congress of the enactments of the Legislative Assembly do not depend on mere inference. Section 2 of the Act approved February 21, 1871, made it the duty of the Governor of the District of Columbia to “take care that the laws be faithfully executed.” Necessarily, it was the duty of the Governor to take care that the ordinance adopted March 7, 1870, *supra*, which had been kept in force by Section 40 of the same Act which created his office, be faithfully executed, as well as the Acts of the Legislative Assembly of 1872 and 1873 which amended and strengthened that ordinance..

When Congress, by the Act approved June 20, 1874,

abolished the Legislative Assembly and created the Temporary Commission Government, it charged the Commissioners thereby provided for with the duty of exercising "all the power and authority now lawfully vested in the governor" of the District. Section 91 of the Revised Statutes of the District of Columbia, approved June 22, 1874, made that duty specific. That section provided:

"All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

The Revised Statutes were followed by the present Organic Act of the District of Columbia, approved June 11, 1878, 20 Stat. 102. Section 1 of that Act provided that "all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect."

By this series of enactments, Congress not only approved the enactments of the Legislative Assembly here in question; it precluded the possibility of repeal of those enactments other than by Act of Congress. In *Metropolitan Railroad Company v. District of Columbia*, 132 U.S. 1, 7, supra, this Court, referring to the Organic Act of the District of Columbia, approved June 11, 1878, and to the Commission Government of the District of Columbia created thereby, said:

"Under these different changes the administration of the affairs of the District of Columbia and City of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. *Legislative powers have now ceased*, and the municipal gov-

ernment is confined to mere administration. (Emphasis supplied.)

Not until 1892 did Congress again vest in the municipal government local legislative power. By the Joint Resolution approved February 26, 1892, 27 Stat. 394, Congress provided:

"Sec. 2. That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations ** as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia."

In his separate opinion, Judge Prettyman, referring to the Joint Resolution of 1892, *supra*, said (R. 92, f.n.7):

"Since 1878 the Board of Commissioners has been the governing body of the District of Columbia, which is a municipal corporation. They have had the power both to make and to enforce municipal regulations and generally to exercise all the usual powers of a municipal corporation. Theirs have been the powers of local ordinance-making and of law enforcement. They could repeal what they could enact.

"27 STAT. 394 (1892), D. C. CODE § 1-226 (1951). Since 1902 they have had specific power to require licenses for businesses or callings. 32 STAT. 622 (1902), as amended, D. C. CODE § 47-2344 (1951)."

Thus, following approval of the Joint Resolution of 1892, *supra*, the Commissioners of the District of Columbia had authority to repeal the enactments of the Legislative Assembly of 1872 and 1873, *Stevens v. Stoutenburgh*, 8 App. D. C. 513. They did not repeal them. Those enactments accordingly were in full force and effect at the time of enactment of the District of Columbia Code of 1901.

After the enactment of the 1901 Code, the Commissioners of the District of Columbia no longer had power to repeal

those enactments. The last paragraph of Section 1636, the repeal section of that Code, provides:

"All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code."

Section 1640 of that Code provides:

"Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia ** of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

By these provisions Congress gave to the enactments of the Legislative Assembly, which it saved from repeal and reaffirmed, a status similar to that of Acts of Congress, in that Congress alone could thereafter amend or repeal them.

5. The Acts of the Legislative Assembly of 1872 and 1873 Were Not Repealed by the 1901 Code of Law for the District of Columbia.

On the basis of their conclusion that the Acts of 1872 and 1873 constituted "general" legislation, the four judges for whom Chief Judge Stephens wrote reached the further conclusion that the Acts were repealed by the District of Columbia Code of 1901, 31 Stat. 1189. Judge Prettyman, as an alternative ground for concurring in the result, stated that, if the Acts "were general legislation they were void from the beginning and in any event were repealed by the 1901 Code." (R. 99)

It is respectfully submitted that this conclusion as to the effect of the 1901 Code is erroneous. It should be emphasized at the outset that the 1901 Code did not specifically or expressly repeal these two Acts. On the contrary, the

conclusion that the Acts were repealed is based upon certain general provisions of the Code. It is pertinent, therefore, to recall the admonition frequently made by this Court that "repeals by implication are not favored" and that the "intention of the legislature to repeal must be clear and manifest." *United States v. Borden Co.*, 308 U. S. 188, 198-199, and numerous authorities there cited.

Section 1636 of the 1901 Code, upon which the opinion of Chief Judge Stephens mainly relied, repealed "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia * * * in force in said District on the day of the passage of this act * * * except: * * *

"Third: Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations."

The Acts of the Legislative Assembly of 1872 and 1873 were clearly saved from repeal by the language of Section 1636. Both imposed duties upon the Commissioners of the District of Columbia, as the successors of the Governor of the District of Columbia, and upon subordinates of the Commissioners—the successors in office or duty of the Register and the attorneys of the District of Columbia. Both enactments were "police regulations," as that term was defined by the Court of Appeals in *United States v. Cella*, 37 App. D. C. 433, 435:

"A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character. While municipal ordinances or police regulations are binding upon the

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community affected by them, they do not emanate from the supreme power of the state, which is the exclusive source of all general legislation."

See also *Johnson v. District of Columbia*, 30 App. D. C. 520, holding that an Act of the Legislative Assembly prohibiting cruelty to animals was a "mere police regulation" and hence saved from repeal under Section 1636 of the 1901 Code.

Both enactments in this case deal with the regulation of licensed public eating places, which Congress, by its enactments from the Act of May 3, 1802, 2 Stat. 195, to the present time, had committed to the regulatory authority of the local District governments. Both enactments related to municipal affairs only, as we have shown above.

Section 1640 of the 1901 Code provided:

"Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia * * * of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

The enactments of the Legislative Assembly of 1872 and 1873 are simply the ordinance of the Council of Washington of March 7, 1870, as modified by the Legislative Assembly. The Court of Appeals held that they "substantially paralleled" that ordinance (R. 85).

In the case of *Barnes v. District of Columbia*, 91 U.S. 540, supra, this Court said (p. 555):

"Names are not things. Perhaps there is no restriction on the power of Congress to create a State within the limits of the District of Columbia; but it does not make an organization a State to call its mayor a Governor, or its common council a legislative Assembly, or its superintendent of streets a Board of Public Works, especially when the statute by which they are created

opens with a declaration of its intention to create a municipal corporation."

By the same reasoning, the ordinance of March 7, 1870, was not converted into a statute by reason of the fact that the common council which amended and strengthened it was called a Legislative Assembly.

Clearly, by enacting Section 1640 of the 1901 Code, Congress intended that such municipal ordinances as these enactments should remain in force until Congress itself modifies or repeals them. This Congress has never done.

Judge Prettyman's alternative ground, that the 1872 and 1873 Acts are no longer effective because they were abandoned through non-enforcement, is plainly without merit. It is elementary that "failure to enforce the law does not change it." *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 759; *Kelly v. Washington*, 302 U. S. 1, 14; *Chicago B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 162.

CONCLUSION

The common councils of the City of Washington, from 1802 to 1871, were elected by the citizens of the city. The members of the House of Delegates, the more numerous branch of the Legislative Assembly, were elected by the citizens of the District of Columbia. When it is considered that on three separate occasions elected representatives of the people enacted ordinances prohibiting discriminatory treatment of Negroes by licensed establishments catering to the public, there can be no question that in 1870, 1872, and 1873 the majority of the people of the District of Columbia wanted to end such discrimination. These anti-discrimination enactments were transmitted to Congress in accordance with law and Congress not only did not repeal them but by Section 91 of the Revised Statutes of the District of Columbia kept them in force, as modified by the Legislative Assembly. A bill, H.R. 5307, 82d Congress, 1st Ses-

sion, introduced September 12, 1951, the sole purpose of which was to repeal the Acts of the Legislative Assembly of 1872 and 1873, failed of passage.

The purpose of the enactments was to give Negroes their full rights as citizens. They are municipal in character, local in application. They were validly enacted. They have never been repealed.

It is respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed with directions that the case be remanded to the Municipal Court for trial on the merits.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
*Principal Assistant Corporation
Counsel, D. C.,*

EDWARD A. BEARD,
*Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.*

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article 1, Section 8, Clause 17:

"The Congress shall have Power ***

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

Article 4, Section 3:

"New States may be admitted by the Congress into this Union: but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

13th Amendment. "e"

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

"e *** Ratification was completed on December 6, 1865 ***. On December 18, 1865, Secretary of State Seward certified that the 13th amendment had become a part of the Constitution ***"

Constitution of the United States of America, Revised and Annotated, 1938, p. 42.

14th amendment. "f"

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"f *** On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution: ***"

Id. p. 43.

Acts of Congress

"An Act for establishing the temporary and permanent seat of the Government of the United States", approved July 16, 1790, 1 Stat. 130:

"Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogocheague, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."

"An Act to incorporate the inhabitants of the city of Washington, in the District of Columbia", approved May 3, 1802, 2 Stat. 195 (p. XXVIII, D.C. Code, 1951):

"That the inhabitants of the city of Washington be constituted a body politic and corporate, by the name of a mayor and council of the city of Washington. ***

"Sec. 2. That the council of the city of Washington shall consist of twelve members, residents of the city, and upwards of twenty-five years of age, to be divided into two chambers, the first chamber to consist of seven members, and the second chamber of five members; the second chamber to be chosen from the whole number of councillors elected, by their joint ballot. The city council to be elected annually, by ballot, in a general ticket, by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the election's being held: ***."

"Sec. 7. That the corporation aforesaid shall have full power and authority to pass all by-laws and ordinances; *** to provide for licensing and regulating auctions, retailers of liquors, ***; to restrain or prohibit gambling, and to provide for licensing, regulating or restraining theatrical or other public amusements within the city; *** to impose and appropriate fines, penalties and forfeitures for breach of their ordinances; ***"

"An Act supplementary to an act entitled 'An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia', approved February 24, 1804. 2 Stat. 254:

"Sec. 3. *And be it further enacted*, That the council shall have power to establish and regulate the inspection of flour, tobacco, and salted provisions, the gauging of casks and liquors, the storage of gunpowder, and all naval and military stores, not the property of the United States, to regulate the weight and quality of bread; to tax and license hawkers and pedlers, to restrain or prohibit tippling houses, lotteries, and all kinds of gaming; to superintend the health of the city, to preserve the navigation of the Potomac and Anacosta rivers, adjoining the city; to erect, repair, and regulate public wharves, and to deepen docks and basins; to provide for the establishment and superin-

tendence of public schools; to license and regulate, exclusively, hackney coaches, ordinary keepers, retailers and ferries; to provide for the appointment of inspectors, constables and such other officers as may be necessary to execute the laws of the corporation; and to give such compensation to the mayor of the city as they may deem fit."

"An Act to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose", approved May 15, 1820, 3 Stat. 583, (p. XXXIII, D. C. Code, 1951).

"Sec. 7. That the corporation aforesaid shall have full power and authority *** to provide for licensing, taxing, and regulating *** ordinaries, and taverns, *** to restrain or prohibit tippling houses, lotteries, and all kinds of gaming; *** to impose and appropriate fines, penalties, and forfeitures, for the breach of their laws or ordinances; *** "

"An Act to continue, alter and amend the charter of the city of Washington", approved May 17, 1848, 9 Stat. 283 (p. XXXVII; D.C. Code, 1951), Section 1.

"That the act of May fifteenth, eighteen hundred and twenty, entitled, 'An Act to incorporate the inhabitants of the City of Washington, and to repeal all acts heretofore passed for that purpose,' and the act of May twenty-sixth, eighteen hundred and twenty-four, entitled 'An Act supplementary to "An Act to incorporate the inhabitants of the city of Washington," passed the fifteenth of May, one thousand eight hundred and twenty, and for other purposes,' and the act or acts supplemental or additional to said acts which were in force on the fourteenth day of May, eighteen hundred and forty, or which may, at the passing of this act, be in force, be and the same are hereby continued in force for the term of twenty years from the date hereof, or until Congress shall by law determine otherwise, with the alterations; additions, explanations, and amendments following, that is to say: *** "

"An Act for the Release of certain Persons held to Service or Labor in the District of Columbia", approved April 16, 1862, 12 Stat. 376, Section 1.

"That all persons held to service or labor within the District of Columbia by reason of African descent are hereby discharged and freed of and from all claim to such service or labor; and from and after the passage of this act neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District."

"An Act providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for other Purposes", approved May 21, 1862, 12 Stat. 407.

"Sec. 4. *And be it further enacted*, That all persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown; shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject or amenable; that they shall be tried for any offenses against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted of any crime or offence against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

"An Act to amend an Act entitled 'An Act to incorporate the Metropolitan Railroad Company in the District of Columbia'", approved March 3, 1865, 13 Stat. 536.

"Sec. 5. *And be it further enacted*, That the provision prohibiting any exclusion from any car on account of color, already applicable to the Metropolitan Railroad, is hereby extended to every other railroad in the District of Columbia."

"An Act to regulate the elective franchise in the District of Columbia", passed over veto January 8, 1867, 14 Stat. 375 (p. XLIV, D. C. Code, 1951), Section 1.

"That, from and after the passage of this act, each and every male person, excepting paupers and persons

under guardianship, of the age of twenty-one years and upwards, who has not been convicted of any infamous crime or offence, and excepting persons who may have voluntarily given aid and comfort to the rebels in the late rebellion, and who shall have been born or naturalized in the United States, and who shall have resided in the said District for the period of one year, and three months in the ward or election precinct in which he shall offer to vote, next preceding any election therein, shall be entitled to the elective franchise, and shall be deemed an elector and entitled to vote at any election in said District, without any distinction on account of color or race."

"AN ACT to provide a government for the District of Columbia", approved February 21, 1871, 16 Stat. 419 (p. XLV, D.C. Code, 1951):

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

"Sec. 4. And be it further enacted, That there shall be appointed by the President, by and with the advice and consent of the Senate, a secretary of said District, who shall reside therein and possess the qualification of an elector, and shall hold his office for four years, and until his successor shall be appointed and qualified; he shall record and preserve all laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session, and one copy of the executive proceedings and official corre-

spondence semiannually, on the first days of January and July in each year, to the President of the United States, and four copies of the laws to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress; and in case of the death, removal, resignation, disability, or absence, of the governor from the District, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy, disability, or absence, or until another governor shall be duly appointed and qualified to fill such vacancy. And in case the offices of governor and secretary shall both become vacant, the powers, duties, and emoluments of the office of governor shall devolve upon the presiding officer of the council, and in case that office shall also be vacant, upon the presiding officer of the house of delegates, until the office shall be filled by a new appointment."

"Sec. 5. *And be it further enacted*, That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. The assembly shall consist of a council and house of delegates. The council shall consist of eleven members, of whom two shall be residents of the city of Georgetown, and two residents of the county outside of the cities of Washington and Georgetown, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall have the qualification of voters as hereinafter prescribed, five of whom shall be first appointed for the term of one year, and six for the period of two years, provided that all subsequent appointments shall be for the term of two years. The house of delegates shall consist of twenty-two members, possessing the same qualifications as prescribed for the members of the council, whose term of service shall continue one year. An apportionment shall be made, as nearly equal as practicable into eleven districts for the appointment of the council, and into twenty-two districts for the election of delegates, giving to each section of the District representation in the ratio of its population as nearly as may be. And the members of the council and of the house of delegates shall reside

in and be inhabitants of the districts from which they are appointed or elected, respectively. *** "

"Sec. 7. *And be it further enacted*, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the passage of this act, except such as are non compos mentis and persons convicted of infamous crimes, shall be entitled to vote at said election, in the election district or precinct in which he shall then reside, and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said District, and for all subsequent elections twelve months' prior residence shall be required to constitute a voter; but the legislative assembly shall have no right to abridge or limit the right of suffrage."

"Sec. 17. *And be it further enacted*, That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to the District or to any municipal corporation therein; nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency.

"Sec. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful

subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

"Sec. 20. *And be it further enacted*, That the said legislative assembly shall not have power to pass any ex post facto law, nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax, in any one year, for all general objects, territorial and municipal, than two dollars on every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particular local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed value of the property of said District, unless authorized by a vote of the people, as *hereinafter* (hereinbefore) provided."

"Sec. 40. *And be it further enacted*, That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A.D. eighteen hundred and seventy-one, and all offices of said corporation abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall re-

main in full force until modified or repealed by Congress or the legislative assembly of said District; ***"

Revised Statutes of the District of Columbia, approved June 22, 1874:

"Sec. 91. All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

Code of Law for the District of Columbia, approved March 3, 1901, 31 Stat. 1189:

"Sec. 1636. All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:"

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations."

"Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both."

"Eighth. An act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the

District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health."

"All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code."

"Sec. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of the principles of equity or admiralty, or of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia, and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

Enactments of the Legislative Assembly

Act of the First Legislative Assembly approved August 23, 1871, Laws of the District of Columbia, Chap. LXIX, p. 87:

"An Act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia."

Sec. 21, Par. Fortieth:

"Proprietors of restaurants and eating-houses shall pay twenty-five dollars annually. Every place, the business of which is to provide meals and refreshments, except distilled or fermented liquors, wines, and cordials, for casual visitors, shall be regarded as a restaurant or eating-house."

"Sec. 24. *And be it further enacted*, That all laws and ordinances of the corporations of Washington and Georgetown and the Levy Court, providing police regulations for the several businesses of the citizens of the District of Columbia, are hereby continued in force; and all acts and ordinances, or parts of the same, of the said corporations of Washington and Georgetown and the Levy Court and the District of Columbia, inconsistent with the provisions of this act, are hereby repealed; and whereas an emergency exists, this act shall go into effect immediately on and after its passage."

Act of the Second Legislative Assembly approved June 20, 1872, Laws of the District of Columbia, Chap. LI, p. 65:

"An Act regulating restaurants, and other public places, and for other purposes."

"Be it enacted by the Legislative Assembly of the District of Columbia, That keepers or owners of restaurants, eating-houses, bar-rooms, or ice-cream saloons, or soda-fountains, at which food, refreshments or drinks are sold, or keepers of barber shops and bathing houses, must put in a conspicuous place in their restaurant, eating-houses, ice-cream saloons, or places for the sale of soda water, a scale of the prices for which

the different articles they have for sale will be furnished.

"Sec. 2. *And be it further enacted*, That persons violating the provisions of the above section are to be deemed guilty of misdemeanor, and, upon conviction in a court having jurisdiction, are to be fined by the court not less than twenty dollars, and not more than fifty dollars.

"Sec. 3. *And be it further enacted*, That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons, or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices, as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

Act of the Third Legislative Assembly approved June 26, 1873, Laws of the District of Columbia, Chap. XLVI, p. 116:

"An Act regulating sales in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms,

and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act.

Be it enacted by the Legislative Assembly of the District of Columbia, That the proprietor or proprietors, or keeper or keepers, of every licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or establishment in the District of Columbia, shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms of his, her, or their restaurant, eating-house, bar-room, ice-cream saloon, or soda fountain room, and in one conspicuous place in each small or private room, if any, used in connection with said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room, for the accommodation of guests, visitors, or customers thereat, printed cards, or papers, on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly sold, or the price or prices for which the articles or things are or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof, and no greater price or prices than those mentioned or contained on said cards or printed papers shall be asked for, demanded, or received from any person, or persons for any of the articles or things kept in any manner for sale in any of the places or establishments aforesaid, either by said proprietor or proprietors, keeper or keepers, or by their agents, employes, or any one acting in any manner for them.

Sec. 2. And be it further enacted, That on or before the first day of November in each year the proprietor or proprietors, keeper or keepers, of each licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room or establishment in said District, as aforesaid, shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale by him, her, or them, as aforesaid, which shall

be filed by the Register in his office, and unless he is notified of changes therein, the copy transmitted and filed in said office may be used in any case or proceeding under this act as *prima facie* evidence of the common or usual prices charged for the articles or things mentioned therein by the proprietor or proprietors, keeper or keepers, of any of the places or establishments aforesaid, and in a failure of any proprietor or proprietors, keeper or keepers, to transmit the copy aforesaid, the Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him.

“Sec. 3. *And be it further enacted*, That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment: *Provided*, That persons of different sexes shall not be accommodated in the same room or rooms unless they accompany each other, or call for any articles or things together, or unless said room or rooms are ordinarily used indiscriminately by persons of both sexes.

“Sec. 4. *And be it further enacted*, That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, shall neglect or refuse to put up printed cards or papers of prices as provided for in the first section of this act, or shall refuse to send a copy or duplicate to the Register, as provided in the second section, or shall place or cause to be placed on said card or paper, or permit to be placed thereon any price or prices other or greater than that for which any article or thing is, or may be, usually and commonly sold or furnished by him, her, or them, or different from or more than is usually or commonly

demanded or received therefor by him, her, or them, or by his, her, or their authority or direction, or shall demand or receive in any manner, or under any circumstances, or for any reason or pretence, in person or by any employé or agent, from any person or persons aforesaid, any sum or prices different or greater than is contained on said cards or papers, or than is usually and commonly asked or received for any article or thing kept for sale as aforesaid, or shall refuse or neglect, in person or by his, her, or their employé or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: *Provided*, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

"Sec. 5. *And be it further enacted*, That all acts and parts of acts inconsistent herewith are hereby repealed."

Corporation Laws of Washington, D. C.

FIRST COUNCIL. "An Act requiring annual licenses to be taken out by pedlars and ordinary keepers; and for the keeping of Carriages and Billiard tables", approved May 25, 1803, p. 45, Chap. XXVII¹ (Section 1).

"That after the first day of July next, licenses to remain in force for one year from their respective dates, and to be annually thereafter renewed, shall be taken out for the following objects, for which the annexed sums shall be paid by the person obtaining the same, to wit:

"For keeping an ordinary, sixteen dollars."

THIRD COUNCIL. "An Act requiring annual licenses to be taken out by ordinary or tavern keepers, retailers, and hawkers or pedlars", approved July 19, 1804, p. 4.²

"Sec. 2. That every person applying for a tavern or ordinary license, shall produce to the mayor good and satisfactory testimonials that he or she hath suitable and proper accommodations for travellers or guests, with at least four good feather beds and bedding, and good stabling for four horses, over and above what is necessary for his or her own use, or the use of his or her own family. And before the license be granted the mayor shall require and receive from the person so applying his or her bond with two citizens approved of by the mayor as sureties in the penal sum of two hundred and fifty dollars each, conditioned for the keeping of such accommodations, bedding and stabling for persons travelling or guests, and for keeping an orderly, quiet and peaceable house."

¹ Corporation Laws of Washington, D. C., 1. 1-15 Councils, 1802-1818 (Reference No. #K859L, W2741, District of Columbia Public Library).

² Id.

"Sec. 5. That for selling liquors in any house other than a tavern, in smaller quantities than a pint, there shall be an annual license first obtained and for which there shall be paid twenty dollars for the use of the city; and the person so applying for license shall produce to the mayor the certificate of at least six inhabitants, householders of the same ward, of the good character of the person so applying, and that they have known him or her for at least six months preceding such application, on which a license shall be granted for one year, and the person to whom such license shall be granted shall give bond with two citizens, approved by the mayor, as sureties, in the penal sum of fifty dollars each, conditioned for the quiet, orderly and peaceable keeping of such house, and that the keeper thereof will not, during the time for which such license shall be granted, suffer any person or persons to play any game of cards, dice or other hazard for money therein, and that he or she will not suffer any apprentice or slave to purchase and drink any wine or spirituous liquors in his or her house, and that the person keeping such house shall not on Sunday sell or suffer to be drank in his or her house any wine or spirituous liquors."

EIGHTH COUNCIL. "An Act to suppress gaming", approved August 16, 1809, p. 4.³

"Sec. 4. That every tavern and ordinary keeper, and every retailer of wine and spirituous liquors, having a license from this Corporation for keeping and retailing the same, shall, on being proved as aforesaid, before a single magistrate, to have permitted any E O, A B C, L S D, faro, rolly-bolly, shuffle-board, equality-table, or other device, for the purpose of playing or gaming for money or any thing in lieu thereof, to be set up, kept and played in his or her house or appurtenances thereto, and on being sentenced as aforesaid to pay the penalty aforesaid, forfeit his or her said license, from the day that judgment shall have been obtained."

³ Id.

NINTH COUNCIL. "An Act further regulating the granting of licenses to ordinary or tavern keepers, retailers of wines and spirituous liquors, hawkers and peddlers, and owners of hackney carriages", approved December 15, 1810, p. 29, Chap. 17.⁴

"Sec. 3. That from and after the first day of January next, the keepers of ordinaries and taverns, under licenses granted by the mayor, shall be, and they are hereby prohibited from selling spirituous liquors to any slave or other person of color, on Sundays after nine o'clock in the forenoon, under a penalty, for the first offense, of twenty dollars; and the forfeiture of their license, on conviction, for a second infraction of this section."

FIFTEENTH COUNCIL. "An Act supplementary to the Act, entitled 'An Act further regulating the granting of licenses to ordinary or tavern keepers, retailers of wines and spirituous liquors, hawkers and peddlars, and owners of hackney carriages.'", approved July 2, 1817, p. 6, Chap. 3.⁵ (Sec. 1).

"That from and after the passage of this act, it shall not be lawful for the Mayor to issue a license to any person other than a tavern or ordinary keeper, to sell spirituous liquors in smaller quantities than a pint."

FIFTIETH COUNCIL. "An Act to License, Tax and Regulate Taverns and Ordinaries", approved June 3, 1853, Title 4, p. 81, Chap. VII.⁶

"Sec. 8. That all keepers of ordinaries or taverns shall be and they are hereby prohibited from selling spirituous liquors to any slave or other person of color, on any day, between sunset and sunrise; and all keepers of ordinaries or taverns shall be and they are hereby prohibited from selling any kind of spirituous, distilled or fermented liquors on Sunday, and are hereby required to have their bars or other places where liquor

⁴ Id.

⁵ Id.

⁶ Corporation Laws of the City of Washington to the End of Fiftieth Council, Revised and Compiled by James W. Sheahan (1853).

is usually sold closed on Sunday during the entire day and evening, and also between the hours of twelve o'clock p.m. and four o'clock a.m. of all other days in the week; and for the first violation of any of the requirements of this section, the person or persons so offending shall be fined not less than ten nor more than twenty dollars, and for the second offense a like fine, and shall forfeit his, her, or their license, which shall be annulled by the Mayor."

"Sec. 12. That all acts and parts of acts heretofore passed by this Corporation, relating to the licensing or regulation of taverns and ordinaries, be and the same are hereby repealed, except so far as they apply to licenses issued under them, and to the regulations and conditions prescribed by them for the government of such licenses, and the fines, penalties and forfeitures incurred under such acts, or any of them."

SIXTY-SECOND COUNCIL. "AN ACT to license, tax, and regulate Hotels, Taverns, Ordinaries, Restaurants, and Tippling-houses", approved October 31, 1864, General Laws, p. 8, Chap. 9.⁷

"Sec. 4. That every person who shall apply for a restaurant or eating-house license shall produce to the Mayor a certificate signed by the commissioner or person acting as commissioner of improvements and six respectable freeholders residing in the same square, or the next adjacent square, or the square opposite to the one in which such person resides, which certificate shall set forth that the said commissioner or person acting as commissioner and each of the said six respectable freeholders have personally examined the premises for which application for a license is made, and that they are satisfied that the person making application hath provided on said premises suitable and proper accommodations for guests, so that said guests may be supplied with such eatables that they may require at any hour that the same may be called for."

⁷ Corporation Laws of Washington, D. C., 12, 62-65/Councils, 1864-1868 (Reference No. + K859L, W2741, District of Columbia Public Library).

"Sec. 10. That all keepers of hotels, taverns, ordinaries, and restaurants be, and they are hereby prohibited from selling spiritous and fermented liquors, wines, cordials, and all other intoxicating liquors to any minor; and all keepers of hotels, taverns, ordinaries, and restaurants, shall be, and are hereby prohibited from selling any kind of spiritous, distilled, or fermented liquors on Sunday, and they are hereby required to have their bars or other places where liquor is usually sold closed on Sunday during the entire day and evening; and for the first violation of any of the requirements of this section, the person or persons so offending shall be fined not less than twenty nor more than forty dollars, and for the second offence a like fine, and shall forfeit his, her, or their license, which shall be annulled by the Mayor."

SIXTY-FOURTH COUNCIL. "An Act to amend an act entitled 'An act to license, tax, and regulate Hotels, Taverns, Ordinaries, Restaurants, and Tippling-houses,' approved October 31, 1864," approved October 10, 1866, General Laws, p. 6, Chap. 6.⁸

"That the first section, third line, second section, second line, tenth section, second line, and twelfth section, third line, of the act entitled 'An act to license, tax, and regulate hotels, taverns, ordinaries, restaurants, and tippling-houses,' approved October 31, 1864, be, and the same is hereby, amended by inserting in the sections and lines aforesaid the word 'sample-room,' after the word 'restaurant;' and that section four be, and is hereby amended by the addition of the following (after the word 'for' on the last line): 'That every person or persons applying for a license to have and to keep a sample-room, or place where liquors are sold by the bottle or more, to be drank on the premises, shall produce to the Mayor a certificate of the Register of the City, showing the square on which such sample-room is proposed to be kept, and that the party applying for such license has obtained from this Corporation a license to vend wines, liquors, or groceries to an amount not less than two thousand dollars;' and that

⁸ Id.

section thirteen be, and is hereby, amended by the addition of the following: 'For a license to keep a sample-room, one hundred dollars,' and the penalty the same as restaurants."

SIXTY-SIXTH COUNCIL. "AN ACT regulating admission to places of public amusement and entertainment", approved June 10,⁹ 1869, General Laws, p. 22, Chap. 36."

"Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington, That from and after the passage of this act it shall not be lawful for any person or persons who shall have obtained a license from this Corporation for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment, or for conducting a place of public amusement of any kind, to make any distinction on account of race or color, as regards the admission of persons to any part of the hall or audience-room where such lecture, concert, exhibition, or other entertainment may be given: Provided, That any person applying shall pay the regular price charged for admission to such part of the house as he or she may wish to occupy, and shall conduct himself or herself in an orderly and peaceable manner, while on the premises; and any person or persons offending herein shall forfeit and pay to this Corporation for each offense a fine of not less than ten nor more than twenty dollars to be collected and applied as are other fines.

"Sec. 2. And be it further enacted, That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed."

SIXTY-SEVENTH COUNCIL. "An Act to regulate admission to, and accommodation in, licensed houses and places of amusement", approved March 7, 1870, General Laws, p. 22, Chap. 42.¹⁰

"Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington, That

⁹ Corporation Laws of Washington, D. C., 13, 66-68 Councils, 1868-1871 (Reference No. + K859L, W2741, District of Columbia Public Library).

¹⁰ Id.

from and after the passage of this act it shall not be lawful for the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color.

“Sec. 2. *And be it further enacted*, That if the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, or any agent acting for him or them, shall violate or offend against the provisions of this act, he or they shall be subject to a fine of not less than fifty dollars for each violation thereof, to be recovered in an action of debt, in the name of the Mayor, Board of Aldermen, and Board of ~~Common~~ Council of the city, on information filed before any police magistrate.

“Sec. 3. *And be it further enacted*, That in lieu of the penalties provided in an ordinance entitled ‘An Act regulating admission to places of public amusements,’ approved June 10, 1869, for the offense therein mentioned, the penalty mentioned in the second section of this act is hereby substituted, and hereafter shall be applicable to and enforced, as herein provided, for any violation of said act of June 10, 1869.

“Sec. 4. *And be it further enacted*, That after the final conviction of any party for the violation of any of the provisions of this act, or of that of June 10, 1869, referred to in the preceding section, and the recovery of the fine, a sum equal in amount to one-half of such fine shall be paid, and warrant drawn in the usual form out of the general fund, to the party who may have been the informer in any such case.

“Sec. 5. *And be it further enacted*, That all acts or parts of acts that are inconsistent with the provisions of this act are hereby repealed.”

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No. 617

IN THE
Supreme Court of the United States

October Term, 1952

DISTRICT OF COLUMBIA, Petitioner,

JOHN R. THOMPSON COMPANY, Inc., Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
*Principal Assistant Corporation
Counsel, D. C.,*
EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

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IN THE
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October Term, 1952

No. 617

DISTRICT OF COLUMBIA, *Petitioner*,

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

I. The Thompson Company's argument that ordinances prohibiting racial discrimination are "general legislation" beyond the power of Congress to enact is without merit.

Basically, the "general versus municipal" concept relied on by respondent and the opinions of the majority judges of the court below rests on the imprecise and confused doctrine first introduced in *Rouch v. Van Riswick*, MacArthur and Mackey 171, a case decided in 1879 by the Supreme Court of the District of Columbia in General Term.

The question involved in *Roach v. Van Riswick* was whether an Act of the Legislative Assembly making judgments obtained in the Supreme Court of the District of Columbia liens on equitable interests in real estate was valid. The judgment was that that Act was of the character of "general legislation" which Congress could not delegate to the Legislative Assembly authority to enact.

A glaring flaw in the court's reasoning in the *Roach* case (pp. 178-179, quoted at R. 70-71) is in its *non sequitur* that if there were separate systems of law in each of three or four municipalities within the District of Columbia, there would be "great confusion and perhaps conflict" and that the consolidation of such municipalities would not change the essential character of the problem. But, of course, in the absence of a multiplicity of municipalities there could be no such conflict, since there would be but one "system of law". If the reasoning of the *Roach* case were valid, it would equally apply to States: a State would have no greater or different powers than those of its "consolidated" municipalities.

The statement in the *Roach* opinion (p. 176) that "municipal regulation . . . is universally recognized as something distinct from the exercise of legislation" is clearly inconsistent with numerous decisions by this Court holding that a municipal ordinance is legislation just as much as a State law. *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148.

Furthermore, the authority of the *Roach* decision on the question of non-delegability of general legislative powers has been entirely undermined by subsequent decisions both of this Court and in the District.

Within six months, the Supreme Court of the District of Columbia in General Term found it necessary to correct the erroneous impression created by the *Roach* decision. In *Cooper v. The District of Columbia*, MacArthur and Mackey 250, while holding that the Act of the Legislative Assembly approved August 23, 1871, which imposed a license

tax on produce dealers in the Washington Market was a valid enactment, that Court said:

"The District of Columbia as a municipality is differently constituted from any other city in any State of the Union. In all other cities there are five sources of power, differing in dignity, superior to the municipal ordinances: first, the Constitution of the United States; second, treaties; third, laws of Congress made in pursuance of the Constitution; fourth, the Constitutions of the States; and fifth, the laws of the States. As no State constitution and no State laws are in force here, the place of these two jurisdictions must be assumed by Congress, which necessarily possesses the power to make the grants to the municipality which are ordinarily made to city governments by the constitution and laws of a State.

"1st. It is insisted that this court has decided that the power of Congress in this particular is not as full as that of the States, with reference to the cities within their borders, and the case of *Roach vs. Van Rensselaer* is referred to as supporting this distinction. It is evident, however, that that case gives no support to this doctrine. All that was decided there was that Congress had no right to bestow upon the legislative assembly of the District any powers which were not necessary for it as a *municipality*; but the decision expressly, in more than one place, declares that whatever was granted by Congress to the legislative assembly of the District, in respect to matters properly pertaining to municipal government, was a valid grant. Indeed, it could not have been held otherwise, since the Supreme Court of the United States, in *Welsh vs. Cook*, 7th Otto, 542, had declared: 'It is not open to reasonable doubt that Congress had power to invest, and did invest, the District government with legislative authority, or that the act of the legislative assembly of June 26, 1873, was within that authority.' "

In the case of *Stoutenburgh v. Hennick*, 129 U. S. 141, both parties relied on *Roach v. Van Riswick*. The question there presented was whether the Act of the Legislative Assembly approved August 23, 1871, which had been held valid in *Cooper v. The District of Columbia*, was valid when applied to a drummer selling goods by sample in the District of Columbia on behalf of his principal, a resident of Baltimore, Maryland. Examination of the decision of the Supreme Court of the District of Columbia in *Re William J. Hennick*, 5 Mackey 489, the judgment in which was reviewed in *Stoutenburgh v. Hennick*, shows that the sole question was whether or not the Act of the Legislative Assembly imposed a burden on interstate commerce. It was to correct the erroneous impression created by the decision in *Roach v. Van Riswick* that this Court stated the basic tenet with which it opened its decision as follows:

“It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.”

In other respects the case of *Roach v. Van Riswick* has been overruled by later decisions of this Court. For example, in the *Roach* case, after referring to *Scott v. Sandford*, 19 How. 393; *American Insurance Company v. Carter*, 1 Pet. 511, and *United States v. Gratiot*, 14 Pet. 526, Judge Cox said (p. 182):

“*Non nostrum est tantas componere lites* (It is not our duty to compare the greatest cases), but until it can be considered as settled, that the power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States,’ is identical with the power to exercise exclusive legislation over such District as may become the seat of government, the practice of Congress in regard to the territorial governments furnishes us no authoritative guide in the interpretation of the clause relating to the District of Columbia.”

But the comments of this Court in later decisions do provide the authoritative guide which Judge Cox found lacking. In the *Civil Rights Cases*, 109 U. S. 3, 19, this Court said:

“We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. * * *”

Again in *Binns v. United States*, 194 U. S. 486, 491, this Court said:

“It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; * * *”

And in *Simms v. Simms*, 175 U. S. 162, 168, this Court held:

“In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legisla-

ture of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory."

Even the substantive rule evolved in the *Roach* case (respecting the power of Congress to authorize the municipal government to empower its courts to provide that court judgments shall operate as liens on equitable interests) was soon repudiated by the Supreme Court of the District of Columbia. In *Johnson v. The District*, 6 Mackey (17 D. C.) 21, 25, the Court said: "Municipal corporations, of course, have no authority to create liens by ordinance or otherwise, *when none has been expressly conferred upon them*; and taxes are not liens upon the property against which they are assessed, unless they are made so by charter, *or unless the corporation is authorized by the legislature to declare them to be liens*." (Emphasis supplied.)

In view of all of the foregoing, it is submitted that the language in the *Roach* case can no longer be regarded as authority for the constitutional construction for which it has been cited by respondent and the Court of Appeals. And see the numerous decisions of this Court cited in the brief for the United States (pp. 20, 27-32, 39, 44-46) which uphold the power of Congress to delegate comprehensive local legislative authority to the District of Columbia.¹

In any event, as *Cooper v. The District*, MacArthur and Mackey (11 D. C.) 250 shows, the *Roach* case decided only that powers *not necessary* for the District as a municipality were not bestowed. The question remains (and was else-

¹ The uniform view of the Founders of the Constitution that Congress could and would delegate broad local powers of self-government was expressed not only by Madison in *The Federalist*, No. 43, but also by many others, including Jefferson.

See *Journals of the Continental Congress (1774-1789)*, Report of Committee, pp. 603, 604 (September 22, 1783);

Padover, *Thomas Jefferson and the National Capital*, "Jefferson's Opinion," pp. 47, 48, lines 10-16 (G. P. O. 1946).

Cf. President Adams' first Address to Congress in Washington, *Annals of Congress (1799-1801)*, p. 723 (November 22, 1800) urging "local powers" and "self-government" for the District of Columbia.

where decided affirmatively in the *Roach* case) whether regulation of places of public accommodation is an appropriate power of a municipality. Thus, the *Roach* case recognized that (p. 176) "the regulation of local concerns in a town, is considered as properly belonging to its inhabitants . . . and it is hardly looked upon as a delegation of legislative authority . . ." To illustrate what is a proper "regulation of local concerns," the court said (p. 178): "... universal usage and legislation recognize the preservation of public order, morals and health, the regulation of markets and places of amusement. . ." and other enumerated powers "as appropriate powers of a municipality" and distinguished such powers from matters relating to titles to property, contracts, commercial law, crimes, etc. Clearly, the regulation of places of public amusement and accommodation, such as restaurants, by prohibiting the denial of service simply because of race or color is one of the "appropriate powers of a municipality" within the square ruling of the *Roach* case, even conceding the restrictive scope of acts relating to municipal affairs, as there drawn.

II. None of respondent's other arguments has any merit.

Respondent has abandoned the theory that the 1872 and 1873 Acts were repealed by implication by the 1878 Organic Act, the sole ground on which the Municipal Court held them ineffective. That theory was completely refuted by Chief Judge Cayton in the Municipal Court of Appeals (R. 33-34). However, respondent's brief urges other arguments not relied upon or referred to in the majority and concurring opinions below. Presumably the judges in the court below would not have ignored these arguments if they were considered to possess any merit. Nevertheless, since respondent is again urging them they will be answered.

At the outset it is important to note that the agreed statement of facts, quoted at pages 2 and 3 of respondent's brief,

was not a statement of the facts on which this case was predicated. It was entered into in an earlier prosecution against respondent, No. 99150, and not in this case, 111,019. It is included in the record in this case solely as part of the memorandum opinion of Judge Myers, upon the basis of which he, *sua sponte*, quashed the information in this case.

A

Restaurant Regulations promulgated by the Commissioners on April 1, 1942, did not repeal the Acts of 1872 and 1873.

Respondent's argument that the 1872 and 1873 Acts were repealed by the Restaurant Regulations adopted by the Commissioners in 1942 is obviously without merit. Section 5 of the Commissioners' 1942 Regulations (respondent's brief, p. 43) is a repealing clause which repeals "all existing regulations or parts of regulations *inconsistent* with these regulations" (emphasis supplied). Thus the regulations repeal only *inconsistent* regulations, and there is surely no inconsistency between the Commissioners' regulations of 1942 and the 1872 and 1873 Acts. The regulations do not purport to be a complete codification or restatement of all the numerous regulatory provisions of law applicable to restaurants. These regulations deal only with health and sanitation requirements. They do not purport, in terms or effect, to encompass regulations of a different nature to which restaurants are amenable, e.g., building and seating restrictions, labor requirements, egress, hours of service, prohibitions against serving alcoholic beverages to certain classes of persons (minors, intoxicated persons), etc., etc.

The non-discrimination provisions of the 1872 and 1873 laws were not affected by the regulations, and both can exist in complete harmony. Even respondent does not contend that the restaurant is immune from the various provisions of law relating to zoning, egress, building construction, health, alcoholic beverages, and minimum wages by reason of the promulgation of the 1942 restaurant regula-

tions. Judge Fahy effectively answered respondent's contention. He said (R. 116):

"The 1942 regulations do not constitute and there is not in existence a complete codification of ordinances regulating restaurants, so that in fact there has been no omission of the equal service provisions from such a codification."

B

The Alcoholic Beverage Control Act of 1934 did not repeal the 1872 and 1873 Acts.

Respondent urges that the 1872 and 1873 Acts have been repealed by the Alcoholic Beverage Control Act of 1934 either on the ground that the latter Act "completely covered the field of the Acts of 1872 and 1873, at least in so far as the sale of liquor is concerned" (Resp. Br. p. 19), or that there are inconsistencies between the ABC Act and the Acts of 1872 and 1873 with respect to sales "to a well-behaved minor" (Resp. Br. p. 20).

Respondent's argument completely misconceives the effect of the ABC Act. The Alcoholic Beverage Control Act of Jan. 24, 1934 (48 Stat. 319, as amended; D. C. Code 1951 ed., sec. 25-101, *et seq.*) regulates simply the sale and use of liquor, beer and wine, including the licensing of places dispensing such beverages. It does not relate to the licensing of restaurants to conduct a restaurant business. Nor is it inconsistent with laws, such as the 1872-1873 Acts, relating to racial discrimination in places of public accommodation. The fact that the A. B. C. Board has jurisdiction to revoke a *liquor license* for violation of the Alcoholic Beverage Control Act (D. C. Code, 1951 ed., sec. 25-106) is not inconsistent with, nor does it preclude, revocation of a *restaurant license* and imposition of a \$100 fine for violation of the 1872-1873 Acts. Even if there were a possible conflict between the prohibition against service of liquor to a minor

and the prohibition against denial of service to a well-behaved respectable person, no such question is here involved. The persons refused service in this case were adults, and the Thompson Company neither has a liquor license issued under the Alcoholic Beverage Control Act, nor, presumably, sells liquor. But there is no such conflict: the ABC Act prohibits simply the sale of liquor to minors, the 1872-1873 Acts prohibit racial discrimination.

Chief Judge Cayton, speaking for the majority of the Municipal Court of Appeals (R. 36) effectively disposed of respondent's contention in the following words:

"The 1872 and 1873 Acts deal with an over-all regulation of various services (restaurants for example); the ABC Act merely places further restrictive regulations upon sales of liquor—which has traditionally been the subject of separate regulation. Both in their own way regulate a different aspect of public health, safety and order. They exist and operate concurrently. For practical purposes the later Act may be regarded as 'merely affirmative, or cumulative, or auxiliary.' *Wood v. The United States*, 16 Pet. 342."

C

The General License Law of 1902 as reenacted in 1932 did not repeal the 1872 and 1873 Acts.

Equally lacking in merit is respondent's contention that the 1872 and 1873 Acts were repealed by the General License Law of 1902 and 1932. The latter Acts do not mention the 1872 and 1873 Acts and are in no way inconsistent with them. Moreover, both of these laws provided that nothing therein "shall be interpreted as repealing any of the police . . . regulations of the District of Columbia regarding the . . . conduct of the businesses . . . herein named". (32 Stat. 590, 629; 47 Stat. 550, 551; D. C. Code, 1951 ed., sec. 47-2307).

The U. S. Court of Appeals for the District of Columbia Circuit has repeatedly held that the License Law was not inconsistent with and did not repeal earlier acts which, like the 1872-1873 Acts, protect the public by regulating the "conduct of the businesses". *Richards v. Davison*, 45 App. D. C. 395 (1916); *District of Columbia v. Lee*, 35 App. D. C. 341 (1910); *United States ex rel. Early v. Richards*, 35 App. D. C. 540 (1910).

The subject matter of the 1932 Act is wholly different from the subject matter of the Acts of 1872 and 1873. The suggestion in the Respondent's Brief (pp. 17-18) that there is an inconsistency between them because of their different sanctions (violation of the 1932 Act is subject to fine up to \$300 or imprisonment up to 90 days and forfeiture of license in the Commissioners' discretion, whereas violation of the Acts of 1872 and 1873 is subject to \$100 fine and forfeiture of license upon conviction) misconceives the issue. The sanctions are for two different types of violations. Violation of the 1932 Act evokes one sanction; violation of the Acts of 1872 and 1873 evokes another. The fact that the Commissioners may revoke a license for violation of the 1932 Act has no bearing on the forfeiture of a license for violation of the Acts of 1872 and 1873, because neither law has any relation to the other.

The authority given to the Commissioners by the Act of 1932 to revoke business licenses is in no way diminished by the continued existence of the Acts of the Legislative Assembly, which provide for the mandatory forfeiture by a violator of his license. A comparable provision is that found in the Traffic Act for the mandatory revocation of automobile operators' permits upon conviction of certain offenses, with discretionary power vested in the Commissioners or their designated agent (Sec. 40-302, D. C. Code, 1951) to revoke permits " * * * for any cause which they or their (designated) agent may deem sufficient" in those cases where revocation is not mandatory.

The lack of connection between the 1932 Act and the 1782-1873 Acts is shown by the legislative history of the 1932 Act. Its purpose was "to remove existing inequalities and inequities" in the license fee schedule found in the Act of July 1, 1902. (H. Rep. No. 1385, 72d Cong., 1st Sess., p. 3; S. Rep. No. 867, 72d Cong., 1st Sess., p. 3.) The act amended the prior act to change many of the fees theretofore in existence so as to base them on the cost of inspection, the use of public space or the expense of maintaining a needed regulatory body, occasioned by the various forms of businesses covered. (*Ibid.*) It was concerned only with new rates of taxation and not with pre-existing restrictions or regulations governing the businesses taxed.

D

Sec. 48 of the 1901 Code, authorizing the Police Court to enforce its judgments by fine or imprisonment, did not repeal the 1872 and 1873 Acts.

Respondent argues on p. 15 of its brief that a repeal of the 1872 and 1873 Acts can be implied from the fact that the Municipal Court for the District of Columbia has no power to impose a forfeiture of license, whereas a forfeiture of license is provided for under the 1872-1873 Acts.

Forfeiture of license of a regulated business for violation of an Act of Congress or Act of the municipal legislative body or regulation of the Commissioners has been a historic and traditional method for the enforcement of the Acts and regulations governing such businesses in the District. Thus the Act of May 3, 1802; 2 Stat. 195, which incorporated the City of Washington, authorized the Council of the City of Washington "to pass all by-laws and ordinances . . . to provide for licensing and regulating" certain businesses and "to impose and appropriate fines, penalties and forfeitures for breach of their ordinances; . . ." (App. to D. C. Brief, p. 3). A similar provision was included in the Act of May 15,

1820, 3 Stat. 583, Sec. 7 (App. to D. C. Brief, p. 4). This authority was exercised by the Council of the City of Washington by adopting ordinances providing for forfeiture of licenses. See ordinances of December 15, 1810 (App. to D. C. Brief, p. 19); ordinance of June 3, 1853 (App. to D. C. Brief, p. 20); and ordinance of October 31, 1864 (App. to D. C. Brief, p. 21). This procedure was specifically approved by Congress by keeping those ordinances in effect by enactment of Sec. 40 of the Organic Act of February 21, 1871.

Judge Cayton held (R. 31) respecting this contention of respondent:

"The Acts are also attacked on the ground that they provide for the forfeiture of licenses. But the object of these Acts is not the collection of a fine or the revocation of a license. See *District of Columbia v. Brooke*, 29 App. D. C. 563. These are merely the enforcement features of the Acts.

"Nor is there merit in defendant's contention that the Acts must fail because the Municipal Court was given no power to forfeit licenses. The short answer is that such power need not and does not rest in the court but in the District of Columbia Commissioners who issued the license in the first place. And there are many instances in which the Commissioners have the power to revoke licenses as a result of court judgments or independently of court action."

The premise of respondent's argument in this connection is that Congress has withheld from the Municipal Court jurisdiction to enter an order requiring forfeiture of license of an establishment convicted of violation of the Acts. From this premise the conclusion is reached that Congress has thereby repealed the entire body of the Acts. This conclusion is as erroneous as the premise is irrelevant. Forfeiture of licenses is accomplished by administrative proceedings, if the violator should fail to surrender its license as required by the Acts; the Acts do not contemplate that the

court should enter any order which by its own force effects a forfeiture. Cf. *City of Duluth v. Cervený*, 218 Minn. 511, 16 N. W. (2d) 779, 785. Hence, the existence or lack of existence of jurisdiction in the Municipal Court to decree forfeiture is of no significance whatsoever in the judicial proceeding, such as is presented here, to determine (a) whether violations of the Acts have occurred, and, if so, (b) what fine, not exceeding \$100, should be imposed for each such violation.

Finally, it is obvious that even assuming an absence of authority in the Legislative Assembly to include a forfeiture provision in the Acts of 1872-73, only the forfeiture would be nullified. *District of Columbia v. Armes*, 8 App. D. C. 393, 415-416; *Cooper v. The District*, MacArthur & Mackey, 250, 258. It would have no effect whatever on the Acts themselves or upon their enforcement by fine alone. *Continental Oil Co. v. City of Santa Fe*, 36 N. M. 343, 15 P. (2d) 667, 670; *City of Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, 491; *City of Greenville v. Pridmore*, 86 S. C. 442, 68 S. E. 636; *Norwood v. Wiseman*, 141 Md. 696, 119 Atl. 688, 691; *Rosencrans v. Eatontown Tp.*, 80 N. J. L. 227, 77 Atl. 88, 91; *Sconyers v. Town of Coffee Springs*, 230 Ala. 206, 160 So. 552; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; cf. *Berea College v. Kentucky*, 211 U. S. 45, 54-5.

E

This prosecution did not take respondent by surprise.

Respondent states at p. 29 of its brief, that the Acts of 1872 and 1873 "were resurrected for this particular prosecution". It is true that this case is a test case, to establish the validity of those Acts. But it is not true that this is a persecution of a defendant who knew nothing of his obligations or of the requirements of the law. The question of the validity of these Acts was a matter of considerable newspaper comment for many months prior to the public announcement by the Commissioners on February 21, 1950,

that the laws were considered valid and enforceable. This announcement was given prominent publicity in the daily newspapers of Washington. See, e.g., *Times-Herald*, February 22, 1950.

Thereafter, a prosecution was initiated in March 1950 when respondent Company knowingly challenged the validity of the law by refusing to admit into its restaurant well-behaved and respectable persons solely because of their race. (Case No. 99150, in the Municipal Court for the District of Columbia, R. 4, 17). That case was dismissed and an appeal was abandoned solely because of technical questions of jeopardy. The violation on which this prosecution is based took place some time thereafter and respondent should be presumed to have had full knowledge that a prosecution would be initiated against any violator of the Acts against whom a complaint might thereafter be instituted. Respondent deliberately chose to test the law. It was not an unknowing defendant. As Judge Fahy said (R. 118):

“The truth is the regulations simply lay unused for many years. This does not justify the intimation that they were unknown to appellant Company until after it violated them, or that they are conditions imposed upon licenses, or that they have been abandoned by omission from non-existent compilations of regulations, or that they are vague. Because of long non-use, because of the legal question of the competence of the Legislative Assembly to enact them, and because of the question whether they have been repealed, the District authorities seek to establish their legal status before insisting upon general compliance. This is a reasonable course to pursue.”

The criticisms of the mechanical approach adopted by the prosecution to determine the validity and enforceability of these Acts of the Legislative Assembly have been both epitomized and answered in the opinion of Chief Judge Stephens below. He said (R. 88) “But we think it appropriate to comment, in this connection, that the enactments

having lain unenforced for 78 years, in the face of a custom of race disassociation in the District, the decision of the municipal authorities to enforce them now, by the prosecution of the instant case, was, in effect, a decision legislative in character."

With all due deference to his view, it was never the purpose of the prosecution to legislate. On the contrary, it was the purpose of the prosecution to raise the question for judicial determination, in strict accord with the view of Chief Judge Stephens expressed in the same opinion, to the effect that "(t)hat question must be determined by the courts." (R. 85)

From the time of filing of information in the instant case to the present, that has been the only purpose of the petitioner.

F

The "Legislative History" of the 1901 Code Submitted by the Washington Board of Trade, Amicus Curiae, is Incomplete.

The Washington Board of Trade, as *amicus curiae*, has submitted a memorandum to the Court which apparently purports to be a complete legislative history of the 1901 Code for the District of Columbia. However, it contains only the beginning and the end of such legislative history and entirely omits the middle. Of course, Judge Cox's original draft was intended as a comprehensive codification of all existing statutes then applicable in the District. Had it been enacted by Congress in the form in which he originally drafted it, the 1872 and 1873 Acts of the Legislative Assembly would unquestionably have been repealed.

The Board of Trade memorandum fails to refer to the very significant changes made in Judge Cox's draft prior to its submission to Congress. This history is thoroughly reviewed in the brief for the United States, pp. 64-67, and need not be repeated here in detail. The short of the mat-

ter is that Judge Cox divided the Code into two parts, the first, dealing with so-called "general and permanent" statutes, and the second, covering statutes dealing with "municipal affairs". Before its introduction in Congress, Judge Cox's draft was reviewed by special committees of the Board of Trade and the Bar Association, by the judges of the Supreme Court of the District of Columbia, and by other interested persons. 9 Rep. Wash. Bd. of Trade 20-21, 134 (Nov. 1899); 10 *id.* 5-7, 138-142 (Nov. 1900). The special committee of the Board of Trade reported as follows (10 *id.* at 139):

* * * it was found impossible, in the time at command, to thoroughly review the second or municipal part of Judge Cox's code. So that the code as submitted to Congress contained only the first or general part of the code touching matters of general jurisprudence.

In other words, even though Judge Cox's original draft was of a comprehensive nature, the code as revised prior to its introduction in Congress eliminated his Part II dealing with municipal laws. This is clearly set forth in the House Committee Report. See H. Rep. No. 1017, 56th Cong., 1st Sess., p. 5.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA, PETITIONER

JOHN B. THOMPSON COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED
STATES



In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, PETITIONER

v.

JOHN R. THOMPSON COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is being submitted to the Court, out of an abundance of caution, in order to dispel any possible doubts that may have arisen during the oral argument as to the general availability to the bar and the public in the District of Columbia of the Acts of 1872 and 1873 of the Legislative Assembly, the validity and continued effectiveness of which are challenged by respondent in this case.

To be sure, the engrossed originals of these Acts are physically in the possession of the Commissioners of the District of Columbia in a bound volume kept in the official headquarters of the District Government in the District Building (R. 90, footnote). That fact is no more significant here than is the fact, in a federal criminal case, that the original engrossed copies of Acts of Congress are kept by the General Services Administration (64

Stat. 1272) and that the original manuscript of the Constitution is in the National Archives.

The Acts of the Legislative Assembly, enacted during the three years of its existence, were printed and published for general use in 1872 and 1873 in the form of session laws, under the authority of Edwin L. Stanton, Secretary of the District of Columbia, whose official duty it was to "record and preserve all laws and proceedings of the legislative assembly" (Sec. 4, Organic Act of 1871, 16 Stat. 419, 420). The laws enacted in 1871 and 1872 at the regular session and two special sessions of the First Legislative Assembly, and at the regular session of the Second Legislative Assembly, were bound together and published on November 1, 1872. The acts passed at the regular session of the Third Legislative Assembly were published on August 1, 1873. In the preface to each of these two volumes Mr. Stanton, as Secretary of the District, states that the Acts of the Legislative Assembly contained therein had been "carefully collated and compared with the original rolls in the archives of the District." The title of the first volume is "Laws of the District of Columbia, 1871-1872"; the second volume, "Laws of the District of Columbia, 1873." These volumes contain the full text of the Acts of June 20, 1872 (2d Legis. Assembly, sess. I, ch. LI) and of June 26, 1873 (3d Legis. Assembly, sess. I, ch. XLVI), which are involved in this case.

In order to ascertain whether these volumes are, and have been, generally available to the bar and the public, the Department of Justice, subsequent

to the oral argument, inquired of the following libraries whether they have these volumes:

1. The Library of the Supreme Court of the United States.
2. The Library of Congress.
3. The Public Library of the District of Columbia.
4. The Bar Association Library in the United States Court House.
5. The Library of the Department of Justice.

We have been advised that these volumes containing the "Laws of the District of Columbia" for 1871-1873, including the Acts here in question, are to be found in all of these libraries. In most of them, they are on the open shelves in the section containing the statutes and decisions for the District of Columbia. Presumably, although we have had no time to check it, these volumes are also available in the private libraries of some of the larger law firms in the District.

Moreover, as Mr. Collady mentioned at the argument, the Acts of 1872 and 1873 here involved are to be found in "The Compiled Statutes in force in the District of Columbia", compiled by W. S. Abert and B. G. Lovejoy, appointed by the Supreme Court of the District of Columbia pursuant to the Act of Congress of March 2, 1889 (25 Stat. 872), which authorized and directed that court "to appoint two persons learned in the law as Commissioners to compile, arrange, and classify, with a proper index, all statutes and parts of statutes in

force in the said District * * *." This compilation was approved by the Supreme Court of the District of Columbia, which on June 2, 1894, ordered that 5,000 copies be printed. It was published that year by the Government Printing Office, and the provisions of the Acts of 1872 and 1873 here involved appear at pages 183-185. This compilation was widely distributed among the bar and public. (We are informed, for example, that this volume is in the library of the firm of Covington & Burling, Union Trust Building, Washington, D.C.). Copies of Abert and Lovejoy's "Compiled Statutes" are to be found on the open shelves of all the libraries in the District referred to above.

Finally, it should be noted that the Act of Congress of March 2, 1911 (36 Stat. 966) directed the District Commissioners to prepare "an index of the laws of Congress relating to the District of Columbia, and of the laws of the former municipal governments in the District which are still in force * * *." (Emphasis added.) Pursuant to this statute, the Commissioners appointed William F. Meyers to make such an index. His "Comprehensive General Index of the Laws of the District of Columbia in force January 1, 1912" makes specific reference to the provisions of the 1872-1873 Acts contained in Abert & Lovejoy's "Compiled Laws." (Pp. 97, 151.) This volume, too, is generally available on the open shelves of all the public libraries listed above.

Since there is not now and never has been a complete codification of *all* the statutes in force in the

District, it is of no significance that these Acts do not appear in the District of Columbia Code. That Code is only "prima facie" evidence of the laws in force in the District (Act of May 29, 1928, 45 Stat. 1007, as amended March 2, 1929, 45 Stat. 1541.) Moreover, Title 49, chapter 3 of the Code, dealing with "Laws Remaining in Force", treats acts of the Legislative Assembly, as well as ordinances of the city of Washington, as continuing in force. (Sec. 49-302.) And the provisions of Sections 1636-1640 of the 1901 Code which, as is shown in our brief (pp. 55-82), did not repeal these Acts but continued them in force, are set out verbatim in Section 49-304 of the D. C. Code.

It is respectfully submitted, therefore, that there is no basis whatsoever for any inference that these laws were "lost", or that it was necessary to pry into musty archives or other obscure places not accessible to the bar and the public generally, in order to ascertain and verify their existence and continuing vitality.

Respectfully submitted,

HERBERT BROWNELL, JR.,
Attorney General.

ROBERT L. STERN,
Acting Solicitor General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

MAY 2, 1953. •

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IN THE
Supreme Court of the United States

October Term, 1952

University of Columbia, Respondent

John R. Thompson, Counsel for Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION
FOR A WRIT OF HABEAS CORPUS

Richard H. Hart,
John S. Wilson,
John V. Murray, Jr.,
355 Fifteenth Street, N. W.,
Washington 5, D. C.,
Counsel for Respondent

WHITEFORD, HART, CLARKSON & WILSON
Of Counsel

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA, *Petitioner,*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent.*

**BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The Respondent, John R. Thompson Company, by its counsel, opposes the granting of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit for the reasons hereinafter stated.

QUESTION PRESENTED

Should this Honorable Court review the decision of the United States Court of Appeals for the District of Columbia Circuit that the Acts of the Legislative Assembly of the District of Columbia of June 20, 1872, and June 26, 1873, which, among other things, provided for a One

One Hundred Dollar fine and forfeiture of license for refusal by a restaurant to serve all respectable well-behaved persons, without regard to race, color, or previous condition of servitude, are not now in force because (1) as the Chief Judge and three Circuit Judges ruled, they were legislation and therefore could not have been enacted by the Legislative Assembly, or in any event, that they had been expressly repealed by the District of Columbia Code of 1901, 31 Stat. 1189, or (2) as another Circuit Judge ruled, were either legislation and so initially invalid, or subsequently repealed, or were municipal regulations which had been abandoned by seventy-nine years of disuse, or repealed by implication.

PETITIONER'S SPECIFICATIONS OF ERRORS

Petitioner's Specifications of Errors to be Urged, found on page 6 of its brief, are five in number. The first is a conclusion, that petitioner does not agree with the result of the judgment below. Of the remaining four specifications only one, specification (4), reflects a proposition concurred in by a majority of the Court of Appeals; Circuit Judge Prettyman, in concurring in the judgment, did not find it necessary to rule upon the propositions reflected in specifications (2), (3) and (5) (R. 89). The only specification of error, therefore, which has any basis in the record is, in the words of the petitioner:

The United States Court of Appeals for the District of Columbia Circuit erred in holding that the Acts of the Legislative Assembly are presently unenforceable either because they were repealed or "abandoned".

It is respondent's position that the Court of Appeals did not so err, and that the case presented to this Honorable court is not such as merits review upon Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I

Even Were the Writ Granted, This Honorable Court Would Not Consider the Constitutional Issue Claimed to be Involved.

Petitioner urges on page 9 of its brief that the writ be granted so that this Court may express an opinion as to how much, if any, of its legislative power concerning the District of Columbia, pursuant to Article I, Section 8, of the Constitution of the United States, Congress could, if it should see fit in the future, delegate to a local governing body. Even were the writ granted, however, this Honorable Court would not express an opinion on this question of constitutional law. With wisdom, this Court has followed the principle that it will not express itself upon questions of constitutional interpretation in cases which can be disposed of upon general principles of law, or upon accepted criteria of statutory or regulatory interpretation. *Spector Motor Service v. McLaughlin*, 323 U. S. 101; *Asbury Hospital v. Cass County*, 326 U. S. 207. As this Court said in the *Spector Motor Service* case:

If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable.

The case at bar may be disposed of upon a single ground which does not involve any constitutional question, namely, the interpretation and construction of the repealing provisions of the District of Columbia Code of 1901, Act of March 3, 1901 (31 Stat. 1189). Section 1 of that Code provided that:

The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and

admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

It will be observed that this section did not preserve the acts of the Legislative Assembly. Section 1636 of the Code, however, provided in part as follows:

All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed except: * * *

Then followed eleven exceptions, only three of which, the third, the fifth, and the eighth, are material here.

The third exception reads:

Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

The Acts of 1872 and 1873 were legislation, not "police regulations". They were, in fact, civil rights legislation. These Acts defined and denounced a new offense. That is, they provided that the exercise of certain rights theretofore enjoyed by restaurant proprietors and others should thereafter constitute a crime. Their purpose was to alter the mores of the people of the District of Columbia by legislative fiat. Specifically, their object was to impose

upon the District of Columbia the principle or theory of social equality. They did not attempt to regulate pre-existing rights or duties but rather to create and enforce new rights and duties, general in nature. In so doing, the Acts imposed upon restaurant owners and others a duty to sell to all and thus interfered with their freedom to contract or not to contract with whom they pleased. The Acts were no more municipal ordinances or police regulations than was the Civil Rights Act of 1875 containing similar provisions, which was enacted by the Congress (18 Stat. 335). Both the Civil Rights Act of 1875 and the Acts of 1872 and 1873 undertook to promulgate a policy of social equality and enforce it by criminal penalties. "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct". *Yakus v. United States*, 321 U. S. 414 at 424.

The Acts in question sought to change the legal nature of the restaurant business. As was so forcefully stated by Chief Judge Stephens in his opinion below (R. 79-81):

In requiring restaurant keepers, upon pain of fine and license forfeiture, to serve any respectable, well-behaved person without regard to race, color, or previous condition of servitude, the enactments limit the freedom of the restaurant keeper in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling. Before the enactments, he could choose customers according to his own business or personal desire. The enactments lift restaurant keeping, theretofore strictly a private enterprise, to the level of a "public employment"—thereby altering the common law, which required inns, but not restaurants, to serve all travellers. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773 (1944); Beale, INNKEEPERS AND HOTELS, 1906, §§ 15, 35, 53, 61, 301; Williston, CONTRACTS (Rev. Ed. v. 4, § 1066, pp. 2964, 2965); 43 C.J.S. INNKEEPERS, § 2, p. 1136. The enactments do not relate, in the usual sense of the terms, "to the promotion or protection of the public

morals and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health" which are the ordinary subjects of municipal regulation. Moreover, the essential object of the enactments was to prevent in restaurants—and in the other businesses enumerated—discrimination on account of race, color or previous condition of servitude, notwithstanding that such discrimination was customary in the District of Columbia at the time the enactments were promulgated. The enactments are in the nature of civil rights legislation.

The courts of the District of Columbia have held in many cases that attempted regulations, analogous to the Acts of 1872 and 1873, constituted general legislation and not police regulations or municipal ordinances. *District of Columbia v. Saville*, 1 MacArthur (8 D.C.) 581; *Roach v. Van Riswick*, MacArthur & M. (11 D.C.) 171; *Smith v. Olcott*, 19 App. D. C. 61; *Coughlin v. District of Columbia*, 25 App. D. C. 251; *United States v. Cella*, 37 App. D. C. 433; *Patrick v. Smith*, 60 App. D. C. 6, 45 F. 2d 924.

Whether or not the Acts of 1872 and 1873 were legislation or municipal ordinances or regulations depends upon their inherent character and nature and not solely upon their geographical scope. The brief of the United States as *amicus curiae* erroneously assumes that the geographical test is the only one to be applied. This so-called test is of no value since the scope of all acts of the Legislative Assembly was limited to the territorial confines of the District of Columbia so that under this test all enactments of the Legislative Assembly would be classified as municipal regulations regardless of subject matter. As has been demonstrated, however, the subject matter of the Acts under review was such that they must be held to have been attempted legislation.

Even if the Acts of 1872 and 1873 could be called municipal regulations in any sense of the term, it is clear from

the language of Section 1636 of the 1901 Code, without reference to any extrinsic criteria, that the words "police regulations" and "acts relating to municipal affairs only" in the third exception were used in a sense too restrictive to include the Acts here in question. This is apparent from analysis of the eighth subsection of Section 1636 of the 1901 Code which saved from repeal the following acts:

An Act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

Were the third exception broad enough to save the Acts of 1872 and 1873 it would have saved, *a fortiori*, those listed in exception eight. Congress thus plainly demonstrated that the meaning of "police regulations" and "acts relat-

ing to municipal affairs only", which were saved in the third exception was not broad enough to include the Acts here in question.¹ To construe Section 1636 differently is to make the eighth exception unnecessary.

The fifth exception of Section 1636 of the 1901 Code exempted from express repeal "All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." The Acts of 1872 and 1873 may have been "penal statutes" but under each Act the penalty for failure to serve food and drink without discrimination was both a fine and forfeiture of the violator's license. The forfeiture of the license was a part of the penalty. Each Act provided in mandatory terms that a violator "shall be fined \$100 and forfeit his * * * license." The very use of the term "forfeit" implies a penal sanction. *Central Nat. Bank v. Dallas Bank & Trust Co.*, 66 S. W. 2d 474 (Tex. Civ. App.); *Southern Ry. Co. v. Inman*, 11 Ga. App. 564, 75 S. E. 908.

Express repeal by Section 1636 of the 1901 Code was one of the grounds of the opinion below by Chief Judge Stephens and was an alternative ground of the opinion of Circuit Judge Prettyman. A majority of the United States Court of Appeals for the District of Columbia Circuit, therefore, has so construed the 1901 Code which is a statute limited in its application to the District of Columbia. This Court has held in *District of Columbia v. Pace*, 320 U. S. 698, that it "will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District".

It was also urged before the Court of Appeals by respondent that if these Acts had not been expressly re-

¹ See also *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773, holding that civil rights legislation was not an act relating to "municipal affairs" or a "police regulation".

repealed by the 1901 Code,² they were repealed by implication by the Organic Act of June 11, 1878 (20 Stat. 102), by the Act of Congress of July 1, 1902 (32 Stat. 622), and the Act of Congress of July 1, 1932 (47 Stat. 550), usually referred to as the General License Law of the District of Columbia (Sections 47—2301 *et seq.* of the District of Columbia Code (1951)) and by the regulations promulgated pursuant thereto, by the Alcoholic Beverage Control Act of 1934, Act of Congress of January 24, 1934 (48 Stat. 319) (District of Columbia Code (1951) Sections 25—101 *et seq.*), or that the Acts had, if held to be regulations, been repealed or abandoned by seventy-eight years of disuse, or had become obsolete. See the concurring opinion of Circuit Judge Prettyman below (R. 89) and *District of Columbia v. Robinson*, 30 App. D. C. 283, and *Reese v. Cobb*, 105 Tex. 399, 403, 150 S.W. 887, 889.

The judgment of the Court of Appeals might be affirmed upon any one of the foregoing grounds. None involves a question of constitutional law, nor does any present a question of national or general importance which would merit review by this Honorable Court upon a writ of certiorari.

II

The Only Specification of Error Reflecting a Proposition in Which a Majority of the Court of Appeals Concurred Does Not Involve a Question of National or General Importance.

Except for the first specification, which merely states a general conclusion, the only specification of error reflecting a proposition concurred in by a majority of the United States Court of Appeals for the District of Columbia Circuit (R. 60-100) is specification (4) which urges that the Court of Appeals erred "In holding that the Acts of the

² The 1901 Code expressly repeals all acts of the Legislative Assembly not saved by one of the eight exceptions to section 1636. This is not "repeal by implication" as suggested on page 17 of petitioner's brief. The question is purely one of statutory construction of section 1636 of the 1901 Code.

Legislative Assembly are presently unenforceable either because they were repealed or abandoned'. The determination of whether the Court of Appeals erred in this respect involves the questions of law discussed in Section I of this brief. It does not present a question of national or general importance, but merely a question of the interpretation of statutes or regulations of the sort normally determined finally with respect to the District of Columbia by the United States Court of Appeals for that circuit. *District of Columbia v. Pace, supra*, 320 U.S. 298. It is not an appropriate question for review by this Honorable Court.

III

Petitioner Is Seeking an Advisory Opinion Upon a Hypothetical Case Which May Never Arise.

A primary reason for the granting of certiorari urged by petitioner (pages 7 and 10 of its brief) and by the United States (pages 10 and 11 of its brief) is that this Court should render an advisory opinion as a chart or guide to Congress in any future legislation it may consider to provide "home rule" for the District of Columbia. This is clearly demonstrated in the "Suggestion that the Case be Advanced," heretofore filed by petitioner and the United States. This Court has repeatedly ruled, however, that it is without power to give advisory opinions. *Barker Painting Co. v. Brotherhood*, 281 U. S. 462; *Busby v. Electrical Utilities Employees Union*, 323 U. S. 72; *Asbury Hospital v. Cass County, supra*, 326 U. S. 207. As this Court said in the *Barker Painting Co.* case:

But a court does all that its duty compels when it confines itself to the controversy before it. It cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen. See *Willing v. Chicago Auditorium Asso.*, 277 U. S. 274.

This view was reiterated in the *Asbury Hospital* case in which it was said:

This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. *Alabama State Federation of Labor v. McAdory*, No. 588, October Term 1944, decided June 11, 1945 (325 U. S. 450), and cases cited.

In *Busby v. Electric Utilities Employees Union*, 323 U. S. 72, 75, this Court said:

It is not the function of the certificate authorized by 28 USCA § 346, 8 FCA title 28, § 346, to require this Court to answer questions not shown to be necessary to the decision of the case. A question will not be answered if it is hypothetical, *Webster v. Cooper*, 10 How (US) 54, 55, 13 L ed. 325, 326; *Pelham v. Rose*, 9 Wall. (US) 103, 107, 19 L ed. 602, 604; *White v. Johnson*, 282 US 367, 373, 75 L ed. 388, 394, 51 S. Ct. 115; *Lowden v. Northwestern Nat. Bank & T. Co.*, 298 US 160, 162, 163, 80 L ed. 1114-1116, 56 S. Ct. 696, 30 Am. Bankr Rep. (NS) 724, or if it is dependent upon other questions which may not appropriately be answered, *Jewell v. Knight*, 123 US 426, 432, 433, 435, 31 L ed. 190, 192, 193, 8 S. Ct. 193; *Lowden v. Northwestern Nat. Bank & T. Co.* supra (298 US 166, 80 L ed. 1118, 56 S. Ct. 696, 30 Am. Bankr Rep. (NS) 724). This Court will not answer a question which will not arise in the pending controversy unless another issue, not yet resolved by the certifying court, is decided in a particular way. *Triplett v. Lowell*, 297 US 638, 647-649, 80 L ed. 949, 955, 956, 56 S. Ct. 645; *Webster v. Cooper*, supra (10 How (US) 55, 13 L ed. 326); cf. *United States v. Buzzo*, 18 Wall. (US) 125, 129, 21 L ed. 812, 813.

The main argument urged for the granting of the writ therefore appears to be a compelling reason why the writ should be denied.

IV

The Opinion of the Court of Appeals Does Not Rule Upon the Issue of Segregation Versus Non-Segregation.

The decision of the Court of Appeals dealt only with the present enforceability of long forgotten acts of a governing body which was abolished in 1874; it did not deal with the power of Congress, the Legislature for the District of Columbia, to enact anti-segregation legislation if it so desired. Segregation was not in issue. The decision of the Court of Appeals would have been the same, and its significance would have been no less, if the Acts of the Legislative Assembly in question had fixed the rate of charges by auctioneers for selling real estate, as did the act considered and held invalid in the case of *Smith v. Olcott, supra*, 19 App. D. C. 61.

It should also be emphasized that this is not a case wherein the local governing body was attempting to enforce segregation through governmental power, as petitioner now does in its schools; this case involved only the question of whether or not old acts, which sought to compel citizens to practice non-segregation, are still enforceable.

V

The Claim of Petitioner and Amicus That the Subject Matter of This Case Is of Great National Importance and Should be Reviewed Is Inconsistent With Their Position on the Merits.

Petitioner on pages 7 and 8 of its brief, and the United States as *amicus curiae* at pages 33 and 34 of its brief, urge that the subject matter of this suit is of national rather than local concern, and for that reason this Honorable Court should grant certiorari. Upon this theory petitioner would appear to concede that because of their nature the Acts in question were legislation and not mere regulation. It follows from this that petitioner cannot with consistency, contend the Acts were mere municipal regulations.

This inconsistent position in which petitioner and *amicus* find themselves emphasizes the fact that this record does not present a case which merits review upon a writ of certiorari.

VI

The Opinions of the Majority of the Court of Appeals Are in Accord With Previous Rulings of This Honorable Court and With Previous Decisions of the Courts of the District of Columbia.

Petitioner claims that one of the grounds relied upon by the Court of Appeals, that Congress may not delegate its legislative power over the District of Columbia, is not in accord with previous decisions of this Court. However, this ruling is consistent with this Court's opinions in *Stoutenburgh v. Herrick*, 129 U. S. 141, and *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1. Counsel for petitioner recognized this fact in his oral and written opinions to the committees of the 80th Congress considering proposed legislation for "home rule" for the District of Columbia.³ Petitioner now urges, however, that this Court ruled differently in *Binns v. United States*, 194 U. S. 486, and *Barnes v. District of Columbia*, 91 U. S. 540. The *Binns* case, however, related to the territory of Alaska, not to the District of Columbia. The applicable constitutional provision there involved, Article IV, Section 3, does not employ the word "legislate", while Article I, Section 8 makes Congress the legislature for the District of Columbia. That section provides that Congress shall have power to "exercise exclusive legislation, in all cases whatsoever, over" the District of Columbia. Petitioner and

³ Hearings before the Subcommittee on Home Rule and Reorganization of the Committee on the District of Columbia of the House of Representatives, 80th Cong., 1st Sess. pp. 240 *et seq.*; Joint Hearings before the Subcommittees on Home Rule and Reorganization of the Senate and House Committees on the District of Columbia, 80th Cong., 2d Sess. pp. 25-8.

amicus assume that stress was placed by the Court of Appeals upon the word "exclusive" in Article I, Section 8. The opinion of Chief Judge Stephens shows that the controlling words were rather "exercise" and "legislation". It is the inability of Congress to abdicate as a legislature which prohibits delegation to a subordinate body. *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Schechter v. United States*, 295 U. S. 495.

The case of *Barnes v. District of Columbia*, *supra*, 91 U. S. 540, antedated *Stoutenburgh v. Hennick*, *supra*, 129 U. S. 141 and, moreover, it is not in point. It did not rule upon what powers Congress could delegate to the Legislative Assembly, but was concerned only with the question of whether the District of Columbia should be held responsible for the neglect and omissions of its officers whom it had no power to select or control.

The Court of Appeals for the District of Columbia in *Smith v. Olcott*, *supra*, 19 App. D. C. 61, said:

Congress has express power "to exercise exclusive legislation in all cases whatsoever," over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia "a body corporate for municipal purposes," could only authorize it to exercise municipal powers.

That Court's predecessor had made similar rulings *Roach v. Van Renswick*, *MacArthur and M.* (11 D.C.) 171 *District of Columbia v. Saville*, 1 McArthur (8 D.C.) 581 and counsel for the petitioner had so recognized such to be the law of the District of Columbia in his oral and written opinions to the Congress.

Petitioner, on page 9 of its brief, claims that the decision below has "erected a barrier to effective home rule in the District of Columbia." The decision erected no such barrier. The Court of Appeals decided only that Congress

cannot delegate its legislative power. The District of Columbia may be granted effective home rule within the framework of this doctrine. In fact, bills providing for home rule have recognized this principle and have proposed to grant home rule in accordance therewith.⁴

CONCLUSION

At pages 9 and 10 of its brief, petitioner claims that this case presents three questions which "should be settled by this Court". However, none of the questions raised by petitioner merits review.

First, the petitioner says the decision of the Court of Appeals "freezes the law of the District of Columbia in the pattern of racial discrimination which the people of the District of Columbia had thrice attempted, through their own representatives, to reject". This statement respondent submits is completely unjustified. The ruling of that Court does not freeze the law in any pattern whatever; on the contrary it leaves the people of the District of Columbia free to determine as individuals what their course of conduct will be. As a result of the decision there is no law in the District of Columbia that compels any man to discriminate or not to discriminate. Moreover, there is nothing in the decision which would prevent the Congress, if it so desired, from enacting civil rights legislation for the District of Columbia.

Second, petitioner says that the ruling of the Court of Appeals that Congress cannot delegate legislative power to the District of Columbia "erected a barrier to effective home rule in the District of Columbia". The ruling erected no such barrier. The principle applied by the Court is not inconsistent with home rule. The ruling of the Court of Appeals, moreover, is in accord with prior decisions of this

⁴ See e.g. Report of the Subcommittee on Home Rule and Reorganization, Committee on the District of Columbia of the House of Representatives on H.R. 6227, 80th Congress, Second Session, April 15, 1948, page 7.

Honorable Court, with prior decisions of the Courts of the District of Columbia and with opinions given by the petitioner's counsel to the Congress.

Third, petitioner says that the effect of the ruling of the Court of Appeals is that Congress is now unable to determine what powers, if any, it may delegate to a subordinate District of Columbia Government. Whether or not proposed or future legislation would be valid under Article I, Section 8, of the Constitution is a question which this Court cannot decide at this time. Such a decision would require an advisory opinion which this Court has many times declared it has no power to give.

None of the questions presented is worthy of review. Furthermore, this case can be decided by the interpretation of a statute limited in its operation to the District of Columbia, a matter properly left to the Court of Appeals of that District.

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RINGGOLD HART,
JOHN J. WILSON,
JO V. MORGAN, JR.,
815 Fifteenth Street, N. W.
Washington 5, D. C.
Counsel for Respondent.

WHITEFORD, HART, CARMODY & WILSON
Of Counsel

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No. 617

**IN THE
Supreme Court of the United States**

October Term, 1952

DISTRICT OF COLUMBIA, *Petitioner*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENT

**RINGGOLD HART,
JOHN J. WILSON,
JO V. MORGAN, JR.
815 Fifteenth Street, N. W.
Washington 5, D. C.
*Counsel for Respondent***

**WHITEFORD, HART, CARMODY & WILSON
*Of Counsel***

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IN THE
Supreme Court of the United States

October Term, 1952

No. 617

DISTRICT OF COLUMBIA, *Petitioner*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The Respondent, John R. Thompson Company, by its counsel, respectfully urges that the judgment of the United States Court of Appeals for the District of Columbia Circuit be affirmed for the reasons hereinafter stated.

OPINIONS BELOW

The opinion of the Municipal Court for the District of Columbia (R. 4) is not reported. The opinion of the Municipal Court of Appeals for the District of Columbia (R. 25) is reported at 81 A. 2d 249. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 60), has not yet been reported.

JURISDICTION

This Honorable Court has jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 1254 of Title 28, United States Code.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct, except that it should be added that the record contains the following Agreed Statement of Facts (R. 17):

Counsel for the District of Columbia and counsel for the defendant agree that the following are the facts in the above entitled case.

That John R. Thompson Company is a corporation doing business in the District of Columbia; that it is the owner and proprietor of a restaurant known as and numbered 725 14th Street, N. W., Washington D. C.; that it holds a District of Columbia license for the conduct of such restaurant and held such license on February 28, 1950; that Sylvester Becker is Vice-President and Superintendent of the Washington Division of the John R. Thompson Company, Inc. and the local manager of the aforesaid restaurant.

That on the 28th day of February, 1950, while said restaurant was open for business, three persons of the Negro race, Mary Church Terrell, Essie Thompson and Arthur F. Elmer, all agreed to be well-behaved and respectable persons, entered said restaurant and requested to be served; that the defendant, through its local manager, informed each of the three persons aforesaid that it was not the policy of the restaurant

to serve to members of the colored race, and defendant then and there refused to sell or otherwise accommodate the three aforesaid persons, or either of them, solely because of their race and color.

And it is further agreed:

There is no official record of any attempted prosecutions for violations of the terms of the Legislative Assembly Act of June 20, 1872; that upon information and belief there were four such prosecutions, all resulting in convictions in the Police Court but all being reversed in the Supreme Court of the District of Columbia, holding criminal court, or resulted in *non pro*; that all four such prosecutions were in the year 1872 and that there have been no further attempted prosecutions under the 1872 Act since that year.

That there is no official record of any attempted prosecutions under the terms of the Legislative Act of June 26, 1873, and, so far as can be learned, there was never an attempt of prosecution under that Act.

And it is further agreed:

That the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the Assessor of the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale, as required by the Act of June 26, 1873, and, so far as is known, no demands were ever made upon local restaurants so to file by the Assessor or other municipal officer.

And it is further agreed:

That the first count of the declarations is based upon the Legislative Assembly Act of June 20, 1872 and the second, third and fourth counts are based upon the Legislative Assembly Act of June 26, 1873.

SUMMARY OF ARGUMENT

The Acts of the Legislative Assembly of June 20, 1872 and June 26, 1873 are not presently enforceable. If it could be held that these Acts were validly enacted, they would have been repealed by the District of Columbia Code of 1901, Act of March 3, 1901, 31 Stat. 1189. The repealing section of that Code, Section 1636, repealed all Acts of the Legislative Assembly with several exceptions, none of which

included the Acts of 1872 and 1873 because those Acts were legislation and were not police regulations. Had the 1901 Code not specifically repealed these Acts, they were impliedly repealed by Section 48 of the same Code, 31 Stat. 1197, relating to the power of the police court to pass sentences, and were also repealed by the District of Columbia General License Law and by the regulations promulgated thereunder, and by the Alcohol Beverage Control Act of 1934. For more than 78 years there have been no prosecutions under the Acts of 1872 and 1873 nor any attempt whatsoever to enforce their provisions prior to 1950, during which time many acts and regulations concerning restaurants have been promulgated, so that these Acts must be considered to have been repealed by a long course of administrative interpretation or by obsolescence.

These Acts, moreover, could never have been validly enacted by the Legislative Assembly. They are legislation, not municipal regulation. The Congress is the legislature for the District of Columbia pursuant to Article I, Section 8, Clause 17, of the Constitution of the United States, and it may not delegate its power as a legislature to any other person or body. The Congress may not constitutionally abdicate or transfer to others its legislative powers. Likewise, the Acts were initially invalid because they provide for the forfeiture of licenses without express authority from the Congress. Irrespective of what body had passed them, they are also constitutionally invalid because they discriminate against the businesses named without any reasonable basis.

ARGUMENT

Introduction

There are two major issues presented by the case, first whether the Legislative Assembly Act of June 20, 1872 and the Legislative Assembly Act of June 26, 1873 were valid when enacted, and, second, if valid, have they been repealed or abandoned. The first question involves important ques-

tions of constitutional interpretation, while the second merely involves the application of the standard canons of statutory construction.

In the Courts below respondent discussed these questions in a chronological order, dealing first with the question of initial validity. In this brief, however, in view of the often enunciated principle of this Honorable Court that it will not express itself upon questions of Constitutional interpretation in cases which can be disposed of upon general principles of law, or upon accepted criteria of statutory interpretation, *Spector Motor Service v. McLaughlin*, 323 U. S. 101; *Asbury Hospital v. Cass County*, 326 U. S. 207, the respondent will discuss first the non-constitutional issue of repeal or abandonment, which in itself disposes of the case.

I

REPEAL

A. Repeal by the District of Columbia Code of 1901, Act of March 3, 1901, 31 Stat. 1189.

Assuming *arguendo* that the Acts of the Legislative Assembly of 1872 and 1873 were not void, and that they survived until 1901, they were repealed in that year when Congress enacted the basic code of laws for the District of Columbia, Act of March 3, 1901, 31 Stat. 1189.

Section 1 of the 1901 Code provided as follows:

The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

It will be observed that this section did not preserve the Acts of the Legislative Assembly. Section 1636 of the Code, however, provided in part as follows:

All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed except: . . .

Then followed eleven exceptions, only three of which, the third, the fifth, and the eighth, are material here.

The third exception reads:

Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations¹

The Acts of 1872 and 1873 were legislation, not "police regulations". They were, in fact, civil rights legislation. These Acts defined and denounced a new offense. That is, they provided that the exercise of certain rights theretofore enjoyed by restaurant proprietors and others should thereafter constitute a crime. Their purpose was to alter the mores of the people of the District of Columbia by legislative fiat. Specifically, their object was to impose upon

¹ The petitioner also argues that since the Acts of 1872 and 1873 impose some duties upon certain officers of the then District of Columbia Government, that they are acts relating to municipal affairs. This argument ignores the language of the third exception which only excepts from express repeal "acts and parts of acts relating to municipal affairs only". These Acts only relate incidentally to duties of public officials, and could not be said to relate to municipal affairs *only*.

the District of Columbia the principle or theory of social equality. They did not attempt to regulate pre-existing rights or duties but rather to create and enforce new rights and duties, general in nature. In so doing, the Acts imposed upon restaurant owners and others a duty to sell to all and thus interfered with their freedom to contract or not to contract with whom they pleased. The Acts were no more municipal ordinances or police regulations than was the Civil Rights Act of 1875, 18 Stat. 335, containing similar provisions, which was enacted by the Congress. Both the Civil Rights Act of 1875 and the Acts of 1872 and 1873 undertook to promulgate a *policy* of social equality and enforce it by criminal penalties. "The essentials of the legislative function are the *determination of the legislative policy* and its formulation and promulgation as a defined and binding rule of conduct". (Emphasis supplied). *Yakus v. United States*, 321 U. S. 414 at 424.

That the attempted enactment of the Acts of 1872 and 1873 by the Legislative Assembly was legislation is indicated by this Court's decision in *Panama Refining Co. v. Ryan*, 293 U. S. 388. In that case the Congress had defined in a general way the policy enunciated by the Act. Nevertheless, this Court in that case said, 293 U. S. at 414-415:

The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question of whether that transportation shall be prohibited by law is obviously one of legislative policy.

The District of Columbia Organic Act of February 21, 1871, 16 Stat. 419, unlike the statute involved in the *Panama Refining Company* case, gave no hint of a policy directive

for the enactment of non-segregation legislation. If in the *Panama Refining Company* case the mere determination of when to make a predetermined policy effective was legislation, the entire determination and enunciation of a non-segregation policy by the Legislative Assembly by its Acts of 1872 and 1873 must be, *a fortiori* legislation.

The Supreme Court of Utah has held that similar attempted enforcement of non-segregation in restaurants by a municipality was legislation, *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773. As was so forcefully stated by Chief Judge Stephens in his opinion below (R. 79-81):

In requiring restaurant keepers, upon pain of fine and license forfeiture, to serve any respectable, well-behaved person without regard to race, color, or previous condition of servitude, the enactments limit the freedom of the restaurant keeper in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling. Before the enactments, he could choose customers according to his own business or personal desire. The enactments lift restaurant keeping, theretofore strictly a private enterprise, to a level of a "public employment" — thereby altering the common law, which required inns, but not restaurants, to serve all travelers. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773 (1944); *Boale*, INNKEEPERS and HOTELS, 1906, §§ 15, 35, 53, 61, 301; Williston, CONTRACTS (Rev. Ed. y. 4, § 1066, pp. 2964, 2965); 43 C.L.S. INNKEEPERS, § 2, p. 1136. The enactments do not relate in the usual sense of the terms, "to the promotion or protection of the public morals and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health" which are the ordinary subjects of municipal regulation. Moreover, the essential object of the enactments was to prevent in restaurants — and in the other businesses enumerated — discrimination on account of race, color or previous condition of servitude, notwithstanding that such dis-

crimination was customary in the District of Columbia at the time the enactments were promulgated. The enactments are in the nature of civil rights legislation. They undertake to establish in the restaurant business, and in the other businesses named, a policy of equal service without respect to race or color, and to enforce that policy by a fine and license forfeiture. Finally, the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's Capital, of national interest. In view of the purpose and effect of the enactments as above described, we think that no other conclusion can reasonably be reached than that they were of the character of general legislation, * * *

This view of Chief Judge Stephens as to the national importance of these Acts is echoed in the petition and in the brief filed by the United States as *amicus*. Petitioner, page 7-8 of its petition says:

"The importance of this case to the people of the entire Nation is manifest. As Chief Judge Stephens pointed out in his opinion,

" * * * the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's capital, of national interest." (R. 82).

The importance to the Nation of solving the problem of racial discrimination in the United States, and particularly in the District of Columbia, is so great that the President devoted a portion of his State of the Union Address to that subject. The President said:

"Our civil and social rights form a central part of the heritage we are striving to defend on all fronts and with all our strength.

"I believe with all my heart that our vigilant guarding of these rights is a sacred obligation binding upon every citizen. To be true to one's own freedom is, in essence, to honor and respect the freedom of all others.

"A cardinal ideal in this heritage we cherish is the equality of rights of all citizens of every race and color and creed.

"We know that discrimination against minorities persists despite our allegiance to this ideal. Such discrimination—confined to no one section of the Nation—is but the outward testimony to the persistence of distrust and of fear in the hearts of men.

"This fact makes all the more vital the fighting of these wrongs by each individual, in every station of life, in his every deed.

"Much of the answer lies in the power of fact, fully publicized; of persuasion, honestly pressed; and of conscience, justly aroused. These are methods familiar to our way of life, tested and proven wise.

"I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia, including the Federal Government, and any segregation in the Armed Forces."

(Vol. 99, Congressional Record, February 2, 1953, No. 18, p. 783, daily issue; House Document No. 75, 83rd Congress, 1st Session, p. 13)

The United States in its brief in support of certiorari at pages 12-13, also quoted from the President's address to Congress and added:

Several hundred thousand Federal employees, representing every segment of our population, work and live in the District of Columbia area. It is the established policy of the United States that its employees shall be hired, and shall work together, without regard to any differences of race or color.

Neither petitioner nor the United States can reasonably differ with Chief Judge Stephens' opinion that Acts determinative of a question of such interest to the nation are legislation,² not mere police regulations.

² It should be remembered that we are not now discussing the question of delegability of legislative power but merely dealing with the question of whether these Acts were legislation, irrespective of how enacted.

This Court in *O'Donoghue v. United States*, 289 U. S. 16 at 539 emphasized that the District of Columbia became "the city, not of a state, not of a district, but of a nation." The determinations of policy with respect to racial segregation in such a city is clearly a matter of national importance. It is unrealistic to suggest the propriety of permitting a decision of such magnitude by way of police or municipal regulation in the capital city of one hundred fifty-eight million people.

The courts of the District of Columbia have held in many cases that attempted regulations, analogous to the Acts of 1872 and 1873, constituted general legislation and not police regulations or municipal ordinances. *District of Columbia v. Saville*, 1 MacArthur (8 D.C.) 581; *Roach v. Van Riswick*, MacArthur & M. (11 D.C.) 171; *Smith v. Olcott*, 19 App. D.C. 61; *Coughlin v. District of Columbia*, 5 App. D.C. 251; *United States v. Cella*, 37 App. D. C. 433; *Patrick v. Smith*, 60 App. D. C. 6, 45 F. 2d 924.

Whether or not the Acts of 1872 and 1873 were legislation or municipal ordinances or regulations depends upon their inherent character and nature and not solely upon their geographical scope. The brief of the United States as *amicus curiae* erroneously assumes that the geographical test is the only one to be applied. This so-called test is of no value since the scope of all acts of the Legislative Assembly was limited to the territorial confines of the District of Columbia so that under this test all enactments of the Legislative Assembly would be classified as municipal regulations regardless of subject matter. As has been demonstrated, however, the subject matter of the Acts under review was such that they must be held to have been attempted legislation.

Even if the Acts of 1872 and 1873 could be called municipal regulations in any sense of the term, it is clear from the language of Section 1636 of the 1901 Code, without reference to any extrinsic criteria, that the words "police regulations" and "acts relating to municipal affairs only"

in the third exception were used in a sense too restrictive to include the Acts here in question. This is apparent from analysis of the eighth subsection of Section 1636 of the 1901 Code which saved from repeal the following acts:

An Act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; and act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

Were the third exception board enough to save the Acts of 1872 and 1873 it would have saved, *a fortiori*, those listed in exception eight. Congress thus plainly demonstrated that the meaning of "police regulations" and "acts relating to municipal affairs only", which were saved in the third exception was not broad enough to include the Acts

ere in question.³ To construe Section 1636 differently is to make the eighth exception unnecessary.

The fifth exception of Section 1636 of the 1901 Code exempted from express repeal "All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." The Acts of 1872 and 1873 may have been "penal statutes" but under each Act the penalty for failure to serve food and drink without discrimination was both a fine and forfeiture of the violator's license. The forfeiture of the license was a part of the penalty. Each Act provided in mandatory terms that a violator "shall be fined \$100 and forfeit his * * * license." The very use of the term "forfeit" implies a penal sanction. *Central Nat. Bank v. Dallas Bank & Trust Co.*, 66 S. W. 1474 (Tex. Civ. App.); *Southern Ry. Co. v. Inman*, 11 Ga. App. 564, 75 S. E. 988. The suggestion made below by the District of Columbia that the provision for license revocation may be remedial is unsound. It is difficult to see how putting a restaurant proprietor out of business for one year would remedy his failure to serve all comers without discrimination. During the suspension of his license, he obviously would serve no one. In short, we think it too plain for argument that the provision for the forfeiture of the license of a restaurant proprietor was intended to be, and was, a penal sanction, in short a threat to induce compliance, not a remedy after violation. Since this forfeiture was a part of the penalty imposed by the Acts of 1872 and 1873 they were not saved by the fifth exception under Section 1636 of the Code of 1901, which preserved only statutes authorizing punishment by fine or imprisonment or both.

Petitioner relies upon Section 1640 of the Code of 1901 to save these acts of the Legislative Assembly from repeal. This section, unlike Section 1636 does not refer to the acts

³ See also *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 73, holding that attempted municipal civil rights legislation was not an act relating to "municipal affairs" or a "police regulation".

of the Legislative Assembly, but to municipal ordinances or regulations, such as might have been adopted by the Commissioners of the District of Columbia prior to 1901. Section 1636, on the other hand, clearly and unambiguously repeals "all acts and parts of acts of the legislative assembly", with the exceptions previously discussed. Being specific, it covers the entire subject, leaving no need to construe Section 1640 so as to create any ambiguity.⁴ Sections 1636 and 1640 are completely consistent. In this respect it may be pointed out that repeal by Section 1636 of the Code of 1901 is an express repeal of all acts of the Legislative Assembly, with exceptions, not a repeal by implication, as suggested by petitioner.

Ignoring the fact that by its terms Section 1636 applies to all acts of the Legislative Assembly, so as to leave no problem of construction, the United States as *amicus* devotes a considerable portion of its brief to the argument that the words of Section 1636 do not mean what they say, and that it did not cover all acts of the Legislative Assembly. This argument is based on a claim that the Congress originally intended to codify the municipal regulations as well as the statutes applicable to the District, in accordance with recommendations of Judge Walter W. Cox. This rather ingenious argument contains several patent fallacies. First, it assumes these Acts were municipal regulations, not legislation, which they were. Secondly, it ignores the express repeal of all acts of the Legislative Assembly, with exceptions not pertinent, in Section 1636. Thirdly, *amicus* admits that Judge Cox, in working up his draft of a proposed code relied upon Albert & Lovejoy's *Compiled Statutes*, Gov't Printing Office, 1894, which included the

⁴ But it might be also added that even were Section 1640 applicable to Acts of the Legislative Assembly, that the Acts of 1872 and 1873 are inconsistent with a portion of the 1901 Code, in that the penalty provided in those Acts exceed the jurisdiction of the police court as set forth in Section 48 of the 1901 Code. See the discussion of implied repeal by that section in the text, *infra*.

Legislative Assembly Acts; yet the Acts of 1872 and 1873 were not incorporated into either section of Judge Cox's proposed code.

For the various reasons stated, it is submitted that the Acts of the Legislative Assembly of 1872 and 1873 were *expressly repealed* by Section 1636 of the District of Columbia Code.

These Acts also were repealed by implication by Section 48 of the Code of 1901, 31 Stat. 1197. A part of the penalty provided by the Acts of 1872 and 1873 is forfeiture of the license of a violator. Section 4 of the Act of 1873 provides for prosecution in the "Police Court of the District of Columbia." The present Criminal Division of the Municipal Court for the District of Columbia, successor of the Police Court, has no power to impose the mandatory penalty provided, \$100.00 and forfeiture of license.

The jurisdiction of the Criminal Branch of the Municipal Court is defined in Section 48 of the Code of 1901. By that section, the then Police Court was given the power "to enforce any of its judgments by fine or imprisonment or both"; but no authority was given the Court to impose a sentence involving the forfeiture of a license in addition to a fine or imprisonment.

Chief Judge Cayton in his opinion in the Municipal Court of Appeals (R. 31) suggests that the absence of power in the Municipal Court to impose the penalty of forfeiture of license is immaterial because the D. C. Commissioners may do so as in the case of revocation of an automobile operator's permit upon conviction of operating under the influence of liquor, Section 40-609 of the D. C. Code (1951); or for failure to satisfy a judgment after an auto accident, Section 40-403, *Id.*; or for conviction of violating the Loan Shark Law, Section 26-606. *Id.*

The learned Chief Judge, however, apparently overlooked basic differences between those acts and the Legislative Assembly Acts of 1872 and 1873. In Section 40-609 the clerk of court is directed to certify the conviction to the

Director of Motor Vehicles who is *expressly* directed to revoke the permit. Section 40-403 likewise has an express direction to the Commissioners or their designated agent to revoke, and, moreover, applies to civil judgments, not to a criminal situation.

In Section 26-606, moreover, the revocation is for violation with or *without* conviction, and there is *express* authority to the Commissioners to revoke, *after a civil hearing*. There is little analogy here to the Legislative Assembly Acts in question.

The revocations in the three code sections cited by the learned Chief Judge, moreover, are remedial, while the forfeiture in the Legislative Assembly Acts is clearly penal as it is obvious that the non-service of patrons will not be remedied during the year of forfeiture. It is plainly a deterrent rather than a remedy, and part of the punishment to be imposed. The very use of the word "forfeiture" rather than revocation, the term used in the cited code sections, would imply that it was a punishment if it were not clear from the Acts themselves. *Central National Bank v. Dallas Bank & Trust Co.*, (Tex. Civ. App.) 66 S. W. 2d 474; *Southern Railway v. Inman*, 11 Ga. App. 564, 75 S. E. 908.

The sentence of license forfeiture is by far the most serious penalty of the Acts. That having been repealed by Section 48, the Acts fail in their entirety.

Primarily because they were expressly repealed, and because they were also impliedly repealed, therefore, neither of these Acts survived the 1901 Code.

B. The Acts of 1872 and 1873 Were Repealed By the District of Columbia General License Law and By Regulations Promulgated Thereunder.

Even if they survived the Code of 1901, the Legislative Assembly Acts of 1872 and 1873 were repealed by the General License Law now in force in the District of Columbia.

Originally enacted in 1902, and reenacted in 1932; the General License Law is now found in the District of Columbia Code (1951), Sections 47-2301, *et seq.* This Act embodies a complete plan for the licensing of businesses, including the restaurant business and others covered by the Acts of 1872 and 1873, and for the revocation of such licenses by the Commissioners. Thus, even if there were no express inconsistencies between the present law and the old Acts of the Legislative Assembly, the present law would supersede and repeal the Acts. In this connection, see *Board of Education v. Borgen*, 192 Minn. 367, 256 N. W. 894; *Swift & Co. v. Sones*, 142 Miss. 660, 107 So. 881; *State v. Coblenz*, 167 Md. 523, 175 Atl. 340; *Godfry v. Bldg. Com'r.*, 263 Mass. 589, 161 N. E. 819, *Eckloff v. District of Columbia*, 4 Mackey (15 D. C.) 572, affirmed 135 U. S. 240; *Callan v. District of Columbia*, 16 App. D. C. 271; *Stevens v. Stoutenburgh*, 8 App. D. C. 513; *Gilbert v. Morgan*, 7 Mackey (18 D. C.) 296; *Fulton v. District of Columbia*, 2 App. D. C. 431.

Moreover, there are substantial inconsistencies between the General License Law and the Acts of 1872 and 1873. Section 47-2301 of the License Law requires licenses of all businesses upon which a license fee or tax is imposed by the Act. Under Section 47-2327(c) the defendant is required to pay a license fee and obtain a license to operate its business. Section 47-2345 expressly authorizes the Commissioners "to revoke any license issued hereunder when, in their judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia, or for any other reason they may deem sufficient." This provision, authorizing the Commissioners to revoke licenses for certain causes which in the exercise of their judgment they may deem sufficient, is inconsistent with the provisions for the *mandatory* forfeiture of licenses contained in the Acts of 1872 and 1873. The Legislative Assembly Acts provide that the restaurant license *must*

be forfeited upon conviction, while the General License Law provides they shall be forfeited for certain causes *in the discretion* of the Commissioners. These latter reasons are not necessarily the same as the former. The later expression of the will of the Congress that revocation shall be discretionary must take precedence over the earlier Legislative Assembly provision that forfeiture for this cause is mandatory.

Also, Section 47-2345 of the General License Law provides that the Commissioners may adopt regulations in furtherance of the purpose of the Act, and Section 47-2347 provides criminal penalties for violation of the Act or of such regulations. The penalties provided are a fine of not more than \$300 or imprisonment for not more than ninety days. Here again we have an inconsistency with the penal provisions of the Acts of 1872 and 1873 which prescribe punishment by \$100 fine and license forfeiture.

Under the provisions of Section 47-2345 of the General License Law, the Commissioners of the District of Columbia have promulgated regulations dealing with the restaurant business. The current restaurant regulations, promulgated by the Commissioners on April 1, 1942, are set out in the Addendum at pages ~~34-43~~ of this brief. See also Article 603-04 of the regulations promulgated by the Commissioners under the Egress Act of December 24, 1942, Public Law 833, 77th Congress, and Section 2 of Article XVII of the current District of Columbia Police Regulations relating to fireproofing. For prior regulations see *Laws and Regulations Relating to Public Health in the District of Columbia*, Government Printing Office, 1930, pages 23, 25, 248 (barber shops), 291, 314. The Municipal Court and the Municipal Court of Appeals should have judicially noticed such regulations. *Tipp v. District of Columbia*, 69 App. D. C. 400, 102 F. 2d 264. On review from those Courts, this Honorable Court may judicially notice them. Without discussing the regulations in detail, it is enough to say that the Commissioners have made no at-

tempt to impose upon restaurants the commands of the Acts of 1872 and 1873. They have dealt with matters such as sanitation and safety from fire and overcrowding but have not attempted to articulate and implement by regulation the social theory of the old Legislative Assembly Acts, nor have the Commissioners, so far as it can be ascertained, ever revoked a restaurant license for conduct by a restaurant proprietor which would constitute a violation of the Acts of 1872 and 1873. Thus there has been a continuing administrative interpretation of the law by the Commissioners which is completely inconsistent with the theory that the Acts of 1872 and 1873 are still in force.

Lest it be said that regulations can not repeal prior legislative acts, let it be remembered that the petitioner, to support the initial validity of the Acts and their non-repeal by the 1901 Code, must argue that they themselves were earlier regulations.

C. The Acts of 1872 and 1873 Were Repealed By the Alcoholic Beverage Control Act of 1934.

The Alcoholic Beverage Control Act of 1934, District of Columbia Code (1951) Section 25-101 *et seq.*, provided for the licensing of hotels, restaurants and taverns which sell intoxicating liquors. Revocation or suspension of such licenses by the Alcoholic Beverage Control Board was *specifically* authorized by Congress in compliance with the rule laid down in *United States Ex. Rel. Daly v. MacFarland*, 28 App. D. C. 552, *infra*, with provision for an appeal to the Commissioners from any decision of the Board revoking or suspending a license for a period of more than thirty days. D. C. Code (1951) Section 25-106. Examination of the Act shows that it sets up a comprehensive scheme for the licensing and regulation of the business of selling intoxicating liquor in restaurants and other establishments covered by the Act. We therefore find again that a recent statute has completely covered the field of the Acts of 1872 and 1873, at least insofar as the sale of liquor is concerned. To this extent the Acts must be repealed by im-

plication. Since it is unreasonable that a customer can demand food and not intoxicants, the remainder of the Acts must fall also.

Moreover, there are specific and direct inconsistencies between the Alcoholic Beverage Control Act and the Acts of 1872 and 1873. Under the Alcoholic Beverage Control Act, for example, intoxicating liquor may not be sold to any person under the age of twenty-one or beer or light wines to any person under the age of eighteen. D. C. Code, (1951) Section 25-121. Under the Acts of 1872 and 1873, however, the proprietor of a bar or restaurant could not refuse to sell to any well-behaved person solely upon the ground of his age. In other words, we have presented an anomalous situation: if the proprietor of a restaurant or tavern complies with the Alcoholic Beverage Control Act by refusing to sell to a well-behaved minor, then he violates the Acts of 1872 and 1873.

Without attempting to multiply instances of inconsistencies between the Alcoholic Beverage Control Act and the Acts of 1872 and 1873, we submit that absurd consequences must result if the old Acts are held to be still in effect. The sensible conclusion, and we think the only reasonable conclusion, is that the old Acts are no longer in force.

D. These Acts Have Been Repealed by a Long Course of Administrative Interpretation or by Obsolescence

In conclusion, on the subject of repeal, it should be emphasized that for more than seventy-eight (78) years there have been no prosecutions under the Acts of 1872 or 1873 (R. 18). Nor has there been any attempt whatever to enforce any provisions of these Acts after the failure of four prosecutions under the earlier Act in 1872 (R. 18). No restaurant has been required to post a schedule of prices, as required by the Acts, no reports of prices have been filed or required to be filed with the Assessor of the District of Columbia (R. 18), and in general the Acts have become obsolescent and been forgotten. They were resurrected for

this particular prosecution. We submit that the failure of the authorities to enforce or attempt to enforce the Acts for such a long period of time constitutes an administrative interpretation that the Acts were not in force and effect. See the opinion of Circuit Judge Prettyman below (R. 89) and *District of Columbia v. Robinson*, 30 App. D. C. 283 and *Reese v. Cobb*, 105 Tex. 399, 403. It should be remembered that to have been validly enacted and to have survived the District of Columbia Code of 1901 these Acts must be held to have been mere municipal regulations, not legislation. While there may be some argument, *Reese v. Cobb*, *supra* to the contrary, whether statutes can become obsolete, or be abandoned by non-user, it would appear that obsolete and abandoned regulations could not be resurrected after 78 years. To rule otherwise would place an intolerable burden on the citizen with respect to regulations having criminal sanctions.

It is interesting to note that in *Coughlin v. District of Columbia*, 25 App. D. C. 251 at 253 the Court of Appeals was not impressed by the claim advanced by the District of Columbia that a regulation under attack was really the resurrection and re-enactment of an old municipal ordinance of the City of Washington. Apparently the Court felt that such old and unused regulations do become obsolete with age.

II

THE ACTS WERE VOID AB INITIO.

A. The Acts of the Legislative Assembly in Question Were Void, Being Acts of General Legislation as Distinguished From Mere Police Regulations or Municipal Ordinances and Therefore Beyond the Power of the Legislative Assembly to Enact.

The power and authority of the Legislative Assembly were derived from the Act of Congress of February 21, 1871, 16 Stat. 419, Ch. 62, which created the Assembly. Specifically, the right of the Legislative Assembly to enact the two measures under review—if that right existed at all—flowed from Section 18 of the Statute, which provided:

Section 18. And be it further enacted, that the legislative power of the District shall extend to all rightful subjects of legislation within the said District, consistent with the Constitution of the United States and the provisions of this Act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the Tenth Section of the First Article of the constitution of the United States; but all acts of the Legislative Assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

It is settled that while the Congress may delegate to the Government of the District of Columbia the power to make municipal and police regulations, Congress, under the Constitution having exclusive legislative power over the District of Columbia, cannot delegate to the District the power to enact legislation.

Congress may not delegate to any other governmental body its power as a legislature. In *Marshall Field & Co. v. Clark*, 143 U.S. 649 at 692, this Court said:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Again in *Panama Refining Co. v. Ryan*, 293 U.S. 388 at 421 this Court said, "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." It is submitted that the Congress would indeed have abdicated its essential legislative functions if the local government of the District of Columbia had been empowered to enact civil rights legislation.

In *Schechter Poultry Corp. v. United States*, 295 U.S. 495 at 541-2 this Court stated:

"To summarize and conclude on this point: § 3 of the Recovery Act is without precedent. It supplies no

standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of Codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of general aims of rehabilitation, correction and expansion described in § 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

See also *Carter v. Carter Coal Co.*, 298 U. S. 238, 311-12; *Currin v. Wallace*, 306 U. S. 1, 15.

The foregoing cases related to attempted delegation of legislative power to members of the Executive Branch of the Government, especially to the President. This Court has made it clear, however, that the principle is broader, that it relates to attempted delegation of legislative power by Congress to any body, presently existing, or to be created. In the *Panama Refining Co.* case, *supra*, this Court, said, at 420:

“The point is not one of motives but of Constitutional authority, for which the best of motives is not a substitute. While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose.”

The Court has recognized the principal that the Congress as a legislature for the District of Columbia may not

delegate its legislative power. This principal has also been recognized by the Courts of the District of Columbia and by counsel for petitioner in his oral and written opinions to Committees of the 80th Congress.³ This Court said in a case involving an Act of the Legislative Assembly of the District of Columbia, *Stoutenburgh v. Hennick*, 129 U. S. 141, at 147:

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

Congress has express power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia "a body corporate for municipal purposes" could only authorize it to exercise municipal powers; and this is all that Congress attempted to do.

Petitioner, and the United States as *amicus* argue that the *Stoutenburgh* case is not a square holding, because the Legislative Assembly Act there involved attempted to regulate interstate commerce. From a reading of the entire opinion, and especially the dissenting opinion of Mr. Justice Miller, however, it is evident that this Court ruled that

³ Hearings before the Subcommittee on Home Rule and Reorganization of the Committee on the District of Columbia of the House of Representatives, 80th Cong., 1st Sess. pp. 240 *et seq.*; Joint Hearings before the Subcommittees on Home Rule and Reorganization of the Senate and House Committees on the District of Columbia, 80th Cong., 2d Sess. pp. 25-8.

Congress could only delegate to, and in fact had only delegated to, the Legislative Assembly the power to enact municipal regulations, and that Congress could not delegate legislative power. See also *Metropolitan R.R. Co. v. District of Columbia*, 132 U. S. 1.

For the past seventy-five years the courts of the District of Columbia have uniformly held that the Congress could not delegate its legislative power over the District, and that purported acts of the Legislative Assembly which were more than municipal regulations were void.

The Court of Appeals for the District of Columbia in *Smith v. Olcott*, *supra*, 19 App. D. C. 61 at 75 said:

"Congress has express power 'to exercise exclusive legislation in all cases whatsoever,' over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes,' could only authorize it to exercise municipal powers.

That Court's predecessor had made similar rulings, *Roach v. Van Riswick*, *MacArthur and M.* (11 D.C.) 171; *District of Columbia v. Saville*, 1 *MacArthur* (8 D.C.) 581.

Petitioner and the United States as *amicus* argue that cases in this Court and in the United States Court of Appeals for the Ninth Circuit respecting the power of the territorial legislatures of the several territories to enact legislation are pertinent to the case at bar, citing cases such as *Binns v. United States*, 194 U. S. 486; *Maynard v. Hill*, 125 U. S. 190; *Territory of Alaska v. First Natl. Bank*, 22 F. 2d 377 (C.A. 9th). These cases do not discuss the principle of the delegation of legislative power by the Congress. It is submitted that unlike Article I, Section 8, Clause 17, the section applicable to the territories does not necessarily make Congress the legislature for the territories, but leaves it free to select or create a legislature in each territory or

constitute itself such legislature. Unlike Article 1, Section 8, Clause 17, applicable to the District of Columbia, Article IV, Section 3, Clause 2, merely provides that "the Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territories." Congress, in its discretion, might well include among the "needful Rules and Regulations" for a particular territory, one providing for the exercise of legislative power by a territorial legislature.

A comparison of the two clauses indicates that the framers of the Constitution did not intend that the District of Columbia be considered a territory. This Court has had occasion in comparing the status of the Federal judiciary in the District of Columbia and the territories, to indicate the basic difference between Article IV, Section 3, Clause 2, on the one hand, and Article I, Section 8, Clause 17, on the other. In *O'Donoghue v. United States*, 289 U. S. 516 at 538-40 this Court said:

In the District clause, unlike the territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupillage may be constituted, but an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental. The District is not an "ephemeral" subdivision of the "outlying dominion of the United States," but the capital—the very heart—of the Union itself, to be maintained as the "permanent" abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states, and for a future immeasurably beyond the prophetic vision of those who designed and created it.

* * * * *

The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense,

and the city organized under the grant became the city, not of a state, not of a district, but of a nation. In the same article which granted the powers of exclusive legislation over its seat of government are conferred all the other great powers which make the nation, including the power to borrow money on the credit of the United States.

As this Court pointed out, the power of Congress as the legislature of the District of Columbia is found in the same article as its other great powers. If it cannot delegate its power to enact legislation respecting interstate and foreign commerce, or to declare war, or the other powers conferred by Article I, Section 8, it cannot delegate its power to exercise legislation over the District of Columbia.

That the Legislative Assembly Acts of 1872 and 1873 were legislation is clear. This has been demonstrated in the first subsection of Section I of this brief. It is argued, however, that any enactment which is of "local" geographic application is a municipal regulation, rather than legislation. Under this criterion, there would be no legislation in existence in the District of Columbia; its entire Code of 1901, as amended from time to time, would consist of municipal regulations, for this Code is applicable only within the territorial limits of the District of Columbia. With respect to the attempted use of the geographic criterion, the Court of Appeals of the District of Columbia said in *United States v. Cella*, 37 App. D. C. 433 at 435-6:

When, therefore, Congress required prosecutions for violations of statutes in the nature of police or municipal regulations to be in the name of the District of Columbia, it undoubtedly had in mind such local regulations as were peculiarly applicable to conditions here existing. It did not, we think, intend to require or permit prosecutions under general penal statutes to be in the name of the District of Columbia, *even though the territorial scope of such statutes was restricted to the District*. A statute making it an offense for a motor vehicle to exceed a certain limit of speed within the city limits would clearly be a penal statute in the nature

of a police regulation. Such a statute would be designed to regulate the speed of motor vehicles in accordance with the requirements of local conditions. The bucket shop statute under consideration, however, is of a different character. We find that statute in the chapter of the Code devoted to crimes and punishments, and in a sub-chapter governing offenses against public policy. The commission of the offense would be as much against public policy in one place as in another; in other words, *while the statute is local in its application, it deals with a subject-matter general in character.* (Italics added)

The absurdity of applying any sort of a geographic test in the District of Columbia leaves but one test, the subject-matter test as previously discussed in Section 1 of this brief. That test demonstrates that these Acts were attempted legislation. The very reasons urged by petitioner and the United States in support of certiorari, quoted in Section I above, show that the subject-matter of the Acts is one of general and national importance, and not an appropriate subject for police or municipal regulation.

Nevertheless, the United States throughout its brief on the merits, refers to an alleged power of Congress to delegate "local legislative power." An analysis of the brief of the United States discloses that the expression "local legislative power," as used in this connection, means nothing more or less than the power to enact municipal ordinances. Referring to this loose use of the word "legislative" in the dissenting opinion in the Court below, Circuit Judge Prettyman said (R. 97):

They say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone. So solution of the problem whether the enactments of 1872-73 were legislation in a general sense or were municipal regu-

latory ordinances is not advanced in the least by saying that the Assembly was a "legislative" body.

It is submitted that the Acts in question were general legislation, the power to enact which could not be constitutionally delegated by the Congress.

B. The Acts of 1872 and 1873 Were Void as an Attempt to Provide for the Forfeiture of Licenses in the Absence of Express Congressional Authority for the Enactment of Such a Provision.

The Acts of 1872 and 1873 both provided that a violator should forfeit his license to do business, and made it unlawful for any officer of the District of Columbia to reissue the license for one year thereafter. It is submitted that even without regard to constitutional questions and limitations, these provisions were beyond the power of the Legislative Assembly.

Section 18 of the Act of Congress of February 21, 1871, which defined the authority of the Legislative Assembly, purported to confer upon the Assembly power to legislate upon all rightful subjects, and other sections of the Act conferred certain specific powers upon the Assembly; but neither Section 18 or any other provision of the Act authorized the Assembly to provide for the forfeiture or revocation of licenses. Apart from the restrictive construction which as we have seen must be placed upon the grant of powers embodied in Section 18, so as to bring it within constitutional limitations, it is clear from the cases in the District of Columbia that such general delegation of power to the Government of the District of Columbia will not sustain regulations providing for the revocation of licenses or restricting the right of licensees to pursue their callings.

United States ex rel Daly v. MacFarland, 28 App. D. C. 552, *supra*, held invalid a regulation promulgated by the Commissioners of the District of Columbia which provided for the revocation of a plumber's license under certain circumstances. While the Court found that the Commissioners had statutory authority to license plumbers and to regulate

the business of plumbing, the Court nevertheless held that the Commissioners had no authority to promulgate and enforce the regulation providing for the revocation of a plumber's license, since the statute contained no express provision for such revocation.

The Court said, 28 App. D. C. 561 at 562:

It will be observed that these Acts taken together are comprehensive, and cover not only the licensing of plumbers and the practice of plumbing, but also specify the authority of the Commissioners in respect thereto. The constitutional guaranties of the liberty and property of the individual undoubtedly include and protect him in the exercise of his right to earn his living by following a lawful calling; and this right is subject only to reasonable control. That such a license as was revoked in this case is a species of property goes without saying. The right to forfeit this property by the revocation of the license must clearly appear, or it must be held not to exist. Judge Dillon says (sec. 345):

A corporation, under a general power to make by-laws, cannot make a by-law ordaining a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly*, conferred by the legislature.

Certainly such power will not be presumed to exist in statutes in restraint of the ordinary and legitimate avocations of life, avocations in which the mass of human toilers gain their livelihood and contribute to the welfare and happiness of society. In *Greater New York Athletic Club v. Wurster*, supra, the court held that a grant of power to abridge and curtail the exercise of the right of the individual to engage in or pursue a business or calling lawful in itself can only be justified and sustained on the theory that the exercise of such power is necessary to the public welfare and safety, and such power cannot be presumed, but must be clearly expressed.

In *United States ex rel. Kreh v. Ingham*, 38 App. D. C. 379, the same Court said, at page 380:

The sole question presented is whether more than one solicitor's license may be issued to one person, under the provisions of sec. 655 of the Code (31 Stat. at L. 1293, Chap. 854); in other words, whether it was intended by that section to limit and restrict the activities of an insurance solicitor to a single company. The calling of such a solicitor being lawful and subject only to reasonable regulation, the intent of the law making power to abridge or curtail the exercise of the right to pursue that calling ought clearly to appear, and not be presumed. *United States ex rel. Daly v. MacFarland*, 28 App. D. C. 552; *Drake v. United States*, 30 App. D.C. 312.

See *Patrick v. Smith*, 60 App. D. C. 6, 45 F. 2d 924, holding that authority in the Public Utilities Commission to require a hacker to furnish a bond of indemnity insurance or a statement of financial responsibility, in order to secure a license to operate a taxicab, would not be implied from a broad statutory grant of power to the Commission. See also *Hutchins Mut. Ins. Co. v. Hazen*, 70 App. D. C. 174, 105 F. 2d 53.

C. The Acts of the Legislative Assembly in Question Were Void for the Reason That They Undertook to Set Up and Apply Unreasonable and Arbitrary Classifications and Distinctions.

It is fundamental that legislation and regulations must deal alike with all persons within their scope who are similarly situated. Classification for legislative purposes must have some reasonable basis. Thus the legislature might fix the age at which persons should be deemed competent to contract for themselves, but no one would claim that competency to contract could be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and unreasonable and therefore invalid. By the same token, although the legislature may exempt certain persons from the scope of a penal statute, such an exemption must be based upon some reasonable

classification, and may not be arbitrary so as to confer a special privilege upon one while denying it to another. A statute which regulates A may not exempt B unless the exemption rests upon some difference between A and B, which furnishes a reasonable basis for the classification. *Truax v. Corrigan*, 257 U. S. 312; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150; *Yick Wo v. Hopkins*, 118 U. S. 356; *Power Mfg. Co. v. Saunders*, 274 U. S. 490; Compare *Barbier v. Connolly*, 113 U. S. 27.

Tested by these fundamental principles, the Acts of 1872 and 1873 were invalid. The Act of 1872 applied to restaurants, hotels, ice cream saloons, soda fountains, barber shops and bath houses. Bar rooms which were not in hotels were not subject to Section 3 of that Act although subject to Section 1. What reasonable basis could there be for requiring the keeper of a bar in a hotel to conform to the Act, while exempting the keeper of the bar next door, which was not connected with the hotel from Section 3 of the Act? Furthermore, what reasonable ground could exist for applying Section 3 of the Act to an ice cream saloon or soda fountain but not to the bar room next door?

That the exemption of bar rooms from the Act of 1872 was prejudicial to restaurants and hotels cannot be denied. Had the Act been enforced against them, no hotel or restaurant could have sold liquor in competition with bar rooms. Hotels and restaurants would have had social equality while bar rooms had the business.

Apparently recognizing that the omission of bar rooms from the Act of 1872 was inequitable and unreasonable, the Act of 1873 specifically included them. This Act, however, did not apply to hotels and was therefore subject in another way to the ~~same~~ vice found in the previous Act. Moreover, no valid reason appears why the proprietors of restaurants, eating houses, bar rooms, ice cream saloons and soda fountain rooms should be made subject to the Act, while the proprietors of butcher shops, grocery stores, dry goods stores, hardware stores and other purveyors of necessities were exempt. If the purveyor of soda water is re-

quired to sell to all comers under penalty of the law, then why should the same rule not apply to one who sells meat or potatoes or milk or clothes or kitchen utensils? If the object of the Act was to protect and maintain the health, safety and morals of the community, as petitioner argues, was free access to soda water more important to this end than freedom to purchase meat, bread and clothing?

CONCLUSION

The Acts of the Legislative Assembly of 1872 and 1873 were attempted legislation. As such they were void because Congress could not delegate legislative power to that body, and in any event they were expressly repealed by the District of Columbia Code of 1901. Even if they had been Municipal regulations, they were so repealed, as they were not "police regulation" or "acts relating to municipal affairs only" as those terms were used in Section 1636 of the 1901 Code.

The Acts were also void *ab initio* because the Legislative Assembly was given no express power to forfeit licenses, and because they were discriminatory, and were also repealed by implication by another part of the 1901 Code, or by later statutes or regulations, and had become obsolete, or been abandoned, by almost a century of disuse.

For these reasons the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

RINGGOLD HART,
JOHN J. WILSON,
JO. V. MORGAN, JR.,
815 Fifteenth St., N.W.,
Washington, D. C.,
Counsel for Respondent.

WHITEFORD, HART, CARMODY & WILSON,
Washington, D. C.,
Of Counsel.

ADDENDUM**Current District of Columbia Restaurant Regulations
Promulgated April 1, 1942.**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICES
WASHINGTON

April 1st, 1942.

ORDERED:

That for the purpose of regulating the establishment, maintenance and operation of restaurants, delicatessens and catering establishments in the District of Columbia, the following regulations are hereby adopted:

**REGULATIONS TO GOVERN THE ESTABLISHMENT AND
MAINTENANCE OF RESTAURANTS, DELICATESSENS
AND CATERING ESTABLISHMENTS IN THE
DISTRICT OF COLUMBIA.**

Section 1. Definitions: The following definitions shall apply to the interpretation and enforcement of these regulations.

A. Restaurant: The term "restaurant" shall mean a place where food, drinks or refreshments are sold or prepared and sold to persons to be consumed on the premises where sold: provided, however, that this definition shall not be interpreted to include boarding houses and private homes.

B. Boarding Houses: The term "boarding house" shall mean every building or structure, or any part thereof, used as, maintained as, or advertised as, or held out to be an enclosure where meals or lunches are furnished for gain or profit, to four or more transients who have sleeping accommodations upon the premises or to four or more boarders, other than hotels or private clubs.

C. Delicatessen: The term "delicatessen" shall mean any establishment where food, drink or refreshments are cooked,

prepared and sold for consumption other than on the premises.

D. Caterer: The term "caterer" shall mean any person who provides and prepares food, drink or refreshments together with utensils for the service of the same; for use and consumption on premises other than where prepared.

E. Food Handler: The term "food handler" shall mean any person who handles food or drink during the preparation or serving, or who comes in contact with any eating or cooking utensils.

F. Eating or Cooking Utensils: The term "eating or cooking utensils" shall include any kitchenware, tableware, cutlery, utensils, containers or other equipment with which food or drink comes in contact during preparation, serving or storage.

G. Health Officer: The term "health officer" shall mean the health authority of the City of Washington, District of Columbia or his authorized representative.

H. Person: The term "person" shall mean person, firm, corporation, co-partnership or association.

Section 2. Approval by the Health Officer: No license to operate or conduct a restaurant, delicatessen or catering establishment within the District of Columbia shall be issued unless the Health Officer shall certify that these regulations have been complied with and that each restaurant, delicatessen or catering establishment is provided with conveniently located separate toilets for male and female employees.

Section 3. Sanitary Requirements: The following sanitary regulations shall apply to all restaurants, delicatessens and catering establishments:

A. Floors: The floors of all rooms in which food or drink is stored, prepared or served, or in which utensils are washed, shall be of such construction as to be easily cleaned,

shall be smooth, and shall be kept clean and in a safe and sanitary condition. In the case of all new establishments, the kitchen floors shall be constructed of a material impervious to water and shall be provided with adequate and sufficient sewer drains to permit thorough cleansing.

B. Walls and Ceilings: Walls and ceilings of all rooms in which food or drink is stored, prepared or served, or in which utensils are washed or stored, shall be kept clean and in a safe and sanitary condition. The walls of all rooms in which food or drink is prepared or utensils are washed shall have smooth, washable surface and shall be finished in a color sufficiently light to permit at least 70% reflectance. In the case of all new establishments, all rooms in which food or drink is prepared or served or in which utensils are washed, shall have a clear ceiling height of not less than seven (7) feet.

C. Lighting: All rooms in which food or drink is stored, or prepared, or in which utensils are washed, shall be provided with adequate natural or artificial lighting. In the case of rooms in which food or drink is prepared or in which utensils are washed, adequate natural or artificial lighting shall be provided sufficient to produce an intensity of not less than fifteen (15) foot candles at thirty inches from the floor. In the case of rooms in which food or drink is stored, adequate natural or artificial lighting shall be provided sufficient to produce an intensity of not less than four (4) foot candles at thirty inches from the floor.

D. Ventilation: All rooms in which food or drink is prepared, or in which utensils are washed, shall be provided with facilities for at least eight air changes per hour; and in no case shall recirculation of air be permitted. All rooms in which food or drink is served shall be provided with facilities for at least five air changes per hour and not more than 50% circulation of air shall be permitted. All cooking units shall be hooded and vented to the outside air by forced draft; provided, however, that this latter re-

quirement shall not apply to simple bread toasters and coffee urns.

E. Doors and Windows: When flies are prevalent, unless other effective means are provided to prevent their access, all openings into the outer air shall be effectively screened and doors shall be self closing.

F. Water Supply: Running hot and cold water supply shall be easily accessible to all rooms in which food is prepared or utensils are washed, and shall be adequate and of a safe, sanitary quality.

G. Construction of Kitchens: The rooms in which food is prepared shall be of adequate size and construction to permit easy cleansing and the unhampered performance of all kitchen operations. Thirty inches of working space shall be required between all units of new equipment and in new establishments.

H. Construction and Location of Utensils and Equipment: All eating and cooking utensils and all show cases and display cases, or windows, counters, shelves, tables, refrigerating equipment and other equipment shall be so constructed and so located as to be easily cleaned and shall be kept clean and in a safe and sanitary condition. In new establishments or in establishments where new installations of equipment are made, a minimum of thirty (30) inches of working space shall be provided/ between counters, back bars and work tables wherever located.

No cooking unit of any kind shall be permitted to be placed or located in any bay window.

Shelves shall be constructed at least one-half ($\frac{1}{2}$) inch from wall, unless tightly stripped to eliminate all cracks.

I. Dishwashing Facilities: In all restaurants and catering establishments where dishwashing is done by other than mechanical means, a three compartment sink shall be provided, each sink having dimensions of not less than 16" x 16" x 14" and equipped with running hot and cold water.

with drainboard of material impervious to moisture affixed to each end of this unit. In addition, facilities shall be provided to secure sterilization of all common eating and drinking utensils.

J. Where mechanical dishwashing machines are used for sterilizing purposes, they shall be equipped so as to provide a minimum temperature of at least 180 degrees F. when in use for such purposes.

All delicatessens shall be provided with a sink of material impervious to water not less than 16" x 16" x 14" equipped with running hot and cold water.

K. Cleansing and Bactericidal Treatment of Eating and Cooking Utensils: All equipment, including display cases, windows, counters, shelves, tables, refrigerators, stoves, hoods and sinks, shall be kept clean. Beer coils shall be cleaned at least weekly and the time of such cleansing shall be kept posted. All cloths used by waiters, chefs and other employees shall be clean. Single-service containers shall be used only once.

All except single-service eating and drinking utensils shall be thoroughly cleansed and sterilized and shall at the time of service to the public be thoroughly clean and sterilized. All multi-use containers and utensils used in the preparation, cooking and serving of food and drink shall be thoroughly cleansed and sterilized immediately following the day's operations.

L. Storage and Handling of Utensils and Equipment: After cleansing and sterilizing treating, no utensil shall be stored, except in a clean dry place, protected from flies, dust or other contamination, and no utensil shall be handled except in such a manner as to prevent contamination, so far as practicable. Single-service utensils shall be purchased only in sanitary containers and shall be stored therein in a clean dry place until used.

Kitchens shall not be used for the storage of other than food products and kitchen or cooking or eating utensils and equipment in use.

M. Wholesomeness of Food and Drink: All food and drink shall be wholesome, unadulterated and free from spoilage. Milk shall be served in the original container in which it is received from the distributor. All shellfish shall be from sources approved by the United States Public Health Service. All cream dispensers shall be so constructed as to be readily cleansed. Sources of cream, milk and ice cream supplies shall be kept posted in accordance with the provisions of the Milk Act of February 27, 1925.

N. Storage and Display of Food and Drink: All food and drink shall be so stored and displayed as to be protected from dust, rodents, flies, vermin, handling, droplet infection, over-head leakage and other contamination. All catering establishments shall provide adequate and suitable facilities for the transportation of foods from the place of preparation to the place of serving.

The containers from which flour, sugar and other similar food products are dispensed in daily usage shall be provided with tight-fitting tops and shall be so constructed as to protect the contents from dust, dirt, insects and other contamination.

O. Rats and Vermin: All persons engaged in the operation of any restaurant, delicatessen or catering establishment shall be required to take all necessary precautions to keep the premises free from rats and vermin. In case of rat or vermin infestation, operators shall report such infestation to the Health Officer for the purpose of procuring proper advice and instructions in order to eliminate the nuisance.

P. Refrigeration: All perishable food or drink shall be kept at or below 45 degrees F. except when being prepared or served. Waste water from refrigeration equipment shall discharge into an open sink or drain properly trapped and sewer connection; provided, that where sewer connections are not available, clean adequate and water-tight drip pans shall be provided.

Q. Health of Employees: The Health Officer shall have full power and authority at any time to make such examinations and tests as may be necessary to determine whether any food handler has a disease in a communicable form or is a carrier of a communicable disease. It shall be the duty of all food handlers to submit to such examinations at the request of the Health Officer and any food handlers who shall refuse to submit to such examination shall not be employed or continued as a food handler in any of the establishments covered by these regulations.

No person knowing himself to be afflicted with disease in a communicable form shall work as a food handler in any of the establishments covered by these regulations. No operating proprietor or manager of any establishment covered by these regulations shall employ or continue to employ any person as a food handler if such operating proprietor or manager has reason to suspect such person is afflicted with disease in a communicable form.

R. Lavatory Facilities: All kitchens, stands and counters where food is prepared, shall be equipped with or have adjacent thereto separate hand-washing facilities for the washing and cleansing of the hands, equipped with running hot and cold water, soap and sanitary towels. The use of the common towel is prohibited. No employee shall return from a toilet room without first having washed his hands. Hand-washing signs shall be posted in each toilet room used by employees.

S. Cleanliness of Food Handlers: All food handlers shall wear clean garments and shall keep their hands clean at all times when engaged in the handling of food, drinking utensils or equipment. All female employees shall wear hair nets and all male employees shall wear caps while engaged in the preparation of food during working hours. All food handlers who in any manner come in contact with or handle food, shall before beginning work thoroughly wash their hands with soap and water. No food handler

shall be permitted to smoke while on duty, and engaged in the preparation, handling or serving of food.

T. Toilets: Every restaurant, delicatessen and catering establishment where male and female help is employed, shall be provided with separate toilet facilities for such male and female employees. Floors and walls of toilets shall be non-absorbent material. Toilet rooms shall not open directly into any room in which food or drink or utensils are handled or stored. All doors shall be self-closing. Toilet rooms shall be kept in a clean and sanitary condition, well lighted and ventilated. All toilets shall be equipped with hand-basins, provided with running hot and cold water, sanitary towels and tissue, and soap.

U. Garbage and Refuse: Adequate and sufficient garbage receptacles shall be provided, constructed of metal, water-tight, and provided with a tight cover. All garbage, trash and waste material shall be stored in such a manner as not to become a nuisance.

V. Miscellaneous: (1) The surroundings of all restaurants, delicatessens and catering establishments shall be kept clean and free from litter and rubbish.

(2) No sleeping facilities or domestic activities shall be permitted in any room which is a part of or which opens into any room where food is prepared, stored or served, or in which utensils are washed or stored. Adequate lockers or dressing rooms shall be provided for the clothing of male and female employees. Soiled linens, coats and aprons shall be kept in vermin-proof containers provided for this purpose.

(3) No article, polish, or other substance containing any cyanide preparation or other poisonous material shall be used for the cleansing or polishing of eating or cooking utensils.

(4) All preparations used for the extermination of vermin, such as sodium fluoride, shall be colored conspicuously

and kept in containers clearly labelled "Poison". Such containers shall not be placed with receptacles containing spices or condiments, or other food substances.

(5) Cracked or chipped dishes and drinking utensils shall not be used, but shall be discarded.

(6) No persons shall bring or permit to be brought into the dining room, kitchen or storeroom of any restaurant, delicatessen or catering establishment, any dog, cat or other animal, except that a blind person led by a trained dog may bring in such dog.

(7) Sugar served to the public in all restaurants shall be dispensed from containers which provide protection of sugar against dirt, dust, other contamination and human handling at all times, except in the case of lump sugar, which is individually-wrapped.

Section 4. Issuance of Manager's Certificate: Within ninety days following the promulgation of these regulations, every manager or operating proprietor of a restaurant, delicatessen or catering establishment in the District of Columbia, shall have obtained from the Health Officer a Manager's Certificate. Such certificate may be obtained by making application for the same at the Health Department and undergoing an examination before a board consisting of three persons; the chairman to be either the Director of Food Inspection of the Health Department or his assistant, and the other members to be persons employed in the Health Department and designated by the Health Officer. This examination shall be designed to test the applicant's proficiency in food and restaurant sanitation.

All applicants successfully passing such examination shall be entitled to and shall be awarded the aforesaid Manager's Certificate which shall entitle the holder to manage any restaurant, delicatessen, or catering establishment in the District of Columbia. Any applicant who fails to pass such examination shall be entitled to a re-examination in thirty days.

It shall be unlawful for any person in the District of Columbia, after the enactment of these Regulations, to assume the management of any restaurant, delicatessen, or catering establishment, without having first qualified for a Manager's Certificate.

Section 5. Repealing Clause: All existing regulations or parts of regulations inconsistent with these regulations are hereby repealed.

Section 6. Penalties: Any person violating any of the provisions of these regulations shall upon conviction be punished by a fine of not more than \$300.00.

Revocation of License: Violation of any of the provisions of these regulations or the failure to comply with any of the requirements thereof shall be ground for the revocation of any license issued hereunder for a restaurant, delicatessen, or catering establishment; Provided, however, that before any such license is revoked the licensee shall be given opportunity to answer and be heard upon the charges against him.

Section 7. Each section of these regulations and every part of each section is hereby declared independent of every other, and the holding of any section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof.

By Order of the Board of Commissioners, D. C.

/s/ G. M. THORNETT

Secretary to the Board

Official Copy Furnished

Judges

C.C.

Asst. C.C.

P.D.

H.D.

Lt. Col. Snow

Dir. of Inspection & Bldg. Insp.

(Officially published in the Times-Herald, April 2, 1942)

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, PETITIONER

v.

JOHN R. THOMPSON COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF THE PETITION FOR A WRIT OF
CERTIORARI

The United States respectfully urges the Court to grant the petition for a writ of certiorari which has been filed by the District of Columbia.

The Court of Appeals, sitting in banc, held in this case that two anti-discrimination statutes enacted by the Legislative Assembly of the District of Columbia in 1872 and 1873, during a brief period in which the residents of the District enjoyed a form of local self-government, are not enforceable. The importance of the case and of the constitutional and statutory questions decided

by the Court of Appeals extends; however, far beyond the holding as to the nonenforceability of the Acts of 1872 and 1873. Although the majority judges did not join in a single opinion for the court, the opinions of Chief Judge Stephens (on behalf of Judges Clark, Miller, Proctor, and himself) and Judge Prettyman (with whom Judge Miller also concurred) are in fundamental agreement on major issues in the case. Briefly, these issues concern (a) the scope of the constitutional power of Congress in relation to the District of Columbia; (b) the extent to which Congress can constitutionally establish a local government in the District of Columbia and delegate to it authority to enact local laws; (c) the scope of the legislative authority delegated by Congress to the Legislative Assembly of the District of Columbia in the Organic Act of 1871 (16 Stat. 419); and (d) the validity and present enforceability of the anti-discrimination statutes enacted by the Legislative Assembly.

These questions of constitutional law and statutory construction are obviously not of mere local concern. On the contrary, it is submitted, the issues raised by the decision of the Court of Appeals are of such large national importance as to warrant review by this Court.

In 1871 Congress, acting under the power granted it by the Constitution to "exercise exclusive Legislation" over the District of Columbia (Article I, Section 8), established a territorial form of government in the District. The Organic Act of February 21, 1871, vested "legislative power and authority" in a Legislative Assembly, consisting of a Council and a House of Delegates. (Section 5.)¹ The Act provided that "*the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act * * *.*" (Section 18; italics supplied.) The executive authority was vested in a Governor, appointed by the President with the advice and consent of the Senate. (Section 3.)²

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two statutes which made it a criminal offense for owners of restaurants and certain other places of public

¹ The Act also provided that the members of the Council were to be appointed by the President with the advice and consent of the Senate, and that the members of the House of Delegates were to be elected by male citizens of the United States residing in the District.

² This form of government was short-lived, ending with enactment of the Temporary Organic Act of June 20, 1874, 18 Stat. 116, which substituted a temporary government of three Commissioners appointed by the President. The Commissioner form of government was placed on a permanent basis by the Organic Act of June 11, 1878, 20 Stat. 102.

accommodation (hotels, bathhouses, barber shops, and bars) to refuse service to any "well-behaved, respectable" person because of his race or color.³ These statutes supplemented and gave concrete application to the Thirteenth, Fourteenth, and Fifteenth Amendments, adopted but a few years earlier, which were designed to assure the newly freed slaves that they stood free and equal before the law and would not be discriminated against on account of race, color, or previous condition of servitude.

For more than three-quarters of a century, however, the Acts of 1872 and 1873 lay dormant. Prior to this prosecution, authorized by the District Commissioners in 1950, no attempt was made after 1874 to enforce the Acts, even though violations were, and continue to be, open and frequent. This case was brought in order to settle the questions (1) whether the Acts of 1872 and 1873 were valid when enacted, and (2) if so, whether they are still in full force and effect.

II

The judgment of the Court of Appeals, holding that the Acts of 1872 and 1873 are unenforceable, was concurred in by five judges constituting

³ Violation was made punishable as a misdemeanor by a \$100 fine and forfeiture of license for one year.

a majority of the full court.⁴ The grounds for this holding are set forth in the separate opinions of Chief Judge Stephens (R. 60-89) and Judge Prettyman (R. 89-100). Except in one relatively minor respect (see footnote 7, *infra*), Judge Prettyman's views on the basic issues in the case coincide with those expressed by Chief Judge Stephens. Both opinions agree on the following propositions:

(1) Congress lacks power under the Constitution to delegate to a local government in the District of Columbia authority to enact "general legislation"; only the authority to enact "regulatory municipal ordinances" can constitutionally be delegated.⁵

⁴ Judge Fahy, with whom Judges Edgerton, Bazelon, and Washington concurred, dissented (R. 100-120). The dissenting judges were of the view that the Acts of 1872 and 1873 were valid when enacted and have not been repealed.

⁵ See opinion of Chief Judge Stephens at R. 79, 82.

The opinion of Judge Prettyman is equally explicit in expressing the view that Congress can delegate only the authority to enact "municipal regulations" and not "general legislation":

* * * There are two possible views. Either they [the 1872 and 1873 Acts] were general legislation, *e. g.*, relating to civil rights, use of property, validity of contracts, or similar subjects; or they were municipal ordinances regulatory of licensed businesses. * * *

The judges who join Chief Judge Stephens take the former view. There are reasons, which he describes, which support that view. From that premise I think the next steps in his opinion follow inevitably. *If the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond*

(2) Although Congress in the Organic Act of 1871 empowered the Legislative Assembly of the District of Columbia to deal with "all rightful subjects of legislation within said District," this delegation of legislative power could not, and did not, include authority to enact local anti-discrimination laws; such laws come within the proscribed category of "general legislation" even though applicable only within the District of Columbia.⁶

*the power permitted a municipal body in the District of Columbia by the Constitution * * **

* * * They [the dissenting judges] say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative only in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone.

* * * If they [the 1872 and 1873 Acts] were general legislation they were void from the beginning * * * (R. 89, 97, 99; italics supplied.)

⁶ The line between "general legislation" and "regulatory municipal ordinances" appears to be somewhat blurred. Chief Judge Stephens admitted "that, for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty." (R. 79.) He thought it clear, however, that the Acts of 1872 and 1873 were "general legislation" because they limited the freedom of the owner of a restaurant "in the use of his property, in the exercise of his power

(3) To the extent that the Acts of 1872 and 1873 constitute "general legislation," they were not only invalid when enacted but for the same reason were also repealed by the District of Columbia Code of 1901 (31 Stat. 1189), since the Code repealed acts of the Legislative Assembly which were "general" in nature and these Acts were not saved from repeal by any exception contained in the Code.⁷

to contract, and in the carrying on of a lawful calling" (R. 79) and were "in the nature of civil rights legislation" (R. 81).

Judge Prettyman agreed that acts "relating to civil rights" come within the prohibited class of "general legislation." He cited, as examples of "general legislation," those "relating to civil rights, use of property, validity of contracts, or similar subjects." (R. 89.)

⁷ The holding that the Acts of 1872 and 1873 were "general legislation" and hence invalid when enacted was thus also conclusive of the question of repeal under the 1901 Code, and the court's conclusion on the latter issue falls if its conclusion on the former is held erroneous. Chief Judge Stephens stated that the Acts of 1872 and 1873 were "of the character of general legislation, the power to enact which the Congress could not constitutionally delegate to the Assembly," and that "in the Act of February 21, 1871, creating the District government and the Legislative Assembly, the Congress did not attempt to endow the Assembly with power to enact such measures * * *." (R. 82.) His opinion also stated (R. 85) that the finding that the Acts of 1872 and 1873 were "general legislation" required the further conclusion that they were repealed by the District of Columbia Code of 1901 (31 Stat. 1189).

Judge Prettyman concluded that the 1872 and 1873 Acts are now unenforceable, whether they are regarded as "general legislation" or "regulatory municipal ordinances". His reasoning was as follows: If the Acts of 1872 and 1873 consti-

III

On the merits, the rulings made by the Court of Appeals in this case are clearly erroneous. As appears *infra*, pp. 17-21, there is a long, unbroken line of decisions of this Court which (a) uphold the power of Congress under the Constitution to delegate to the federal territories, including the District of Columbia, authority to legislate on local matters, and (b) construe territorial organic acts containing provisions substantially identical to Section 18 of the District of Columbia Organic Act of 1871 as delegating comprehensive authority to enact local legislation.

Nothing in the Constitution, or in the decisions of this Court interpreting it, supports the notion that the constitutional power of Congress to delegate local legislative authority in the District is limited by a vague and undefined distinction between "general legislation" and "municipal regulations." That distinction was evolved in the law of municipal corporations governing the powers of ordinary municipalities within a state. Even in that context, it does not forbid a state, if

tuted "general legislation," they were, for the reasons stated by Chief Judge Stephens, invalid when enacted, and in any event repealed by the 1901 Code; if the Acts were "regulatory municipal ordinances" and valid when enacted, they "must be deemed by the courts to have been abandoned by the licensing authority" (R, 89-90).

For the reasons set out in footnote 26, *infra*, the Government believes that both these grounds for holding the Acts unenforceable are clearly without merit.

it chooses to do so, to delegate to a municipality authority to enact local ordinances dealing with a "general" subject-matter. In any event, the considerations underlying that distinction are wholly inapplicable to the District of Columbia, and it has no relevance in determining the scope of the power granted to Congress in the Constitution for governing the District of Columbia.

Apart from the decision of the Court of Appeals in this case, there could be no doubt (as is shown *infra*, pp. 13-21) of the power of Congress to establish a local government in the District of Columbia and to delegate to it authority to enact local legislation. The decision below, however, has created widespread uncertainty and stirred grave doubts as to the extent of the power of Congress in relation to the District of Columbia. This aspect of the decision below has particular significance at the present time, when Congress is considering proposed legislation to grant "home rule" to the residents of the District of Columbia. In his address to Congress on February 2, 1953, President Eisenhower recommended that "Here in the District of Columbia, serious attention should be given to the proposal to develop and to authorize, through legislation, a system to provide an effective voice in local self-government." Bills providing home rule for the District were passed by the Senate in

⁸ H. Doc. No. 75, 83d Cong., 1st Sess., p. 13.

1949 (81st Cong., 1st Sess.)⁹ and again in 1952 (82d Cong., 2d Sess.).¹⁰ Similar legislation has been introduced at the present session.¹¹

The proposals for home rule in the District have two main objectives which give the matter national as well as local importance: (1) To extend to the residents of the District of Columbia, as fully as is consistent with the national interest, the democratic right, enjoyed by all other American citizens, of local self-government. (2) To relieve Congress, ~~of~~ the unnecessary, time-consuming burden of acting as a city council for the District. The Joint Committee on the Organization of Congress (the La Follette-Monroney committee) reported that "a high percentage of congressional time is devoted to matters of purely local or petty importance. More time is consumed in serving as the city council for the District of Columbia than is spent on matters involving great importance to the Nation. * * * The Nation cannot afford the luxury of having its national legislative body and the District committees in both the House and Senate perform the duties of a city council for the District of Columbia. In order to relieve Congress of this extraneous work-load and enable it to devote full attention to national legislation, we recommend that a

⁹ S. 1527; 95 Cong. Rec. 7010-7018.

¹⁰ S. 1976; 98 Cong. Rec. 391.

¹¹ S. 999; H. R. 1396.

plan for self-rule for the District of Columbia be provided as early as possible." ¹²

The question whether, and in what form, Congress should grant the people of the District of Columbia home rule with authority to enact local laws incident to self-government, including those dealing with problems arising from racial discrimination, is properly one of legislative policy and not of constitutional power. Prior to the decision below, Congress was concerned more with the wisdom of such legislation than its constitutionality.¹³ The decision of the Court of Appeals in this case compels Congress to deal with home rule legislation under a heavy overhanging cloud of doubt and confusion as to the extent of its constitutional power. That cloud would remain indefinitely as an effective obstacle to legislative action, if the decision below should stand unreviewed. In the national interest, review and reversal of the decision of the Court of Appeals is required to enable Congress to deal with the question of home rule for the District as it should be dealt with, in the framework of

¹² S. Rep. No. 1011, 79th Cong., 2d Sess., p. 24.

¹³ See, *e. g.*, the report of the Senate Committee on the District of Columbia recommending enactment of S. 1976 by the 82d Congress. That report contained a supporting memorandum of law which concluded that there was no doubt as to the power of Congress "to vest in a legislative body established for the District of Columbia general legislative power with respect to the District." (S. Rep. No. 630, 82d Cong., 1st Sess., p. 13.)

legislative policy determination rather than of constitutional interpretation.

A further reason exists for granting the writ in this case. The Court of Appeals has held unenforceable two local laws prohibiting racial discrimination by owners of restaurants and certain other places of public accommodation in the District of Columbia. The decision below does more than to deprive these Acts of vitality; in holding that "civil rights legislation" is outside the proper limits of municipal power, the court has erected a barrier against delegation by Congress to the people of the District of Columbia of authority to deal, on a local basis, with the problem of racial discrimination in the District.

The importance of solving this problem is emphasized by the recognition given it by the President in his address to the Congress on February 2, 1953, in which he reviewed the major issues confronting the country and stated the basic policies which would be pursued by the Administration in dealing with them. He said:

Our civil and social rights form a central part of the heritage we are striving to defend on all fronts and with all our strength.

* * * * *

A cardinal ideal in this heritage we cherish is the equality of rights of all citizens of every race and color and creed.

We know that discrimination against minorities persists despite our allegiance to this ideal.

* * * *

I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia, including the Federal Government * * * ¹⁴

Several hundred thousand Federal employees, representing every segment of our population, work and live in the District of Columbia area. It is the established policy of the United States that its employees shall be hired, and shall work together, without regard to any differences of race or color.

IV

So far as concerns the power of Congress to legislate for it, or to delegate local legislative power, the District of Columbia stands on the same constitutional footing as other federal territories. The government of the District was specifically provided for by Article I, Section 8 of the Constitution, which reads as follows:

The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over, such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *

¹⁴ H. Doc. No. 75, 83d Cong., 1st Sess., p. 13.

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¹⁴ H. Doc. No. 75, 83d Cong., 1st Sess., p. 13.

The word "exclusive" does not, as the majority judges in the Court of Appeals seemed to assume, mean "non-delegable." It was put into the constitutional provision solely in order to make it clear that the law-making authority of Congress should be exclusive and not concurrent with that of the ceding states. See *The Federalist*, No. 43. The Supreme Court of the District of Columbia, in 1879, correctly observed "that the term 'exclusive' has reference to the States, and simply imports *their* exclusion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to, that of Congress and created by it." *Roach v. Van, Riswick, MacArthur & Mackey* 171, 174.¹⁵

There is no significant difference, with regard to the power of Congress to delegate local legislative authority, between Article I, Section 8, dealing with the District of Columbia, and Article IV, Section 3, dealing with the other federal territories. The latter provision reads:

The Congress shall have Power to dispose of and make all needful Rules and Regu-

¹⁵ The framers of the Constitution apparently took it for granted that local self-government would be established for the District of Columbia. Madison wrote in *The Federalist*, No. 43: "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them [the residents of the District]." And almost immediately upon assuming control over the District area, Congress established local governments, with popularly elected legislative bodies, which continued until 1871. See footnote 23, *infra*.

lations respecting the Territory or other Property belonging to the United States * * *

The word "exclusive" in Article I, Section 8, serves the same function as "all" in Article IV, Section 3. Under both provisions it is clear that the law-making power of Congress with respect to the District of Columbia and the territories is exclusive, but only in the sense that no state can intrude upon its supreme legislative authority; under neither provision is Congress precluded from creating subordinate bodies endowed with local legislative authority.

The Act of July 16, 1790, 1 Stat. 130, in which Congress established the District of Columbia as the permanent seat of the government of the United States, described it as a "district of territory." (See footnote 23, *infra*.) And when Congress in the Organic Act of 1871 established a single unified government for "all that part of the territory of the United States included within the limits of the District of Columbia" (16 Stat. 419), the debates on the bill reflected an explicit recognition that it was creating a territorial government for the District patterned on other territorial governments. Cong. Globe, 41st Cong., 3d Sess., 642-644, 686-687, 1363. And both this Court and the Court of Appeals for the District of Columbia, in referring to the form of government established by the 1871 Act, characterized it as a "territorial government." *Eckloff v. District of*

Columbia, 135 U. S. 240, 241; *District of Columbia v. Hutton*, 143 U. S. 18, 20; *Roth v. District of Columbia*, 16 App. D. C. 323, 330; and see *Grant v. Cooke*, 7 D. C. 165, 194, 200-201.

The Act of 1871 delegated to the Legislative Assembly of the District of Columbia an all-embracing legislative power extending "*to all rightful subjects of legislation within said District*," consistent with the Constitution, of the United States and the provisions of this act. * * *." [Section 18; italics added.]¹⁶ The words "all rightful subjects of legislation" did not originate in the Organic Act of 1871. Congress used substantially identical language in defining the legislative powers of the territorial governments established in earlier territorial organic acts;¹⁷ and

¹⁶ This comprehensive power was restricted in two respects: (1) the prohibitions upon the powers of the States contained in Article I, Section 10 of the Constitution (*i. e.*, against entering into treaties, granting letters of marque and reprisal, coining money, etc.) were made applicable to the District of Columbia; and (2) Congress reserved the right to repeal or modify all acts of the Legislative Assembly. In addition, the act withheld from the Legislative Assembly power to legislate on specified matters such as divorce, descent, court procedure, and remission of fines. None of these is relevant to the acts involved in the present case. 16 Stat. 419, 423.

¹⁷ Territorial Organic Acts of: *Louisiana* (March 26, 1804, 2 Stat. 283, 284); *Wisconsin* (April 20, 1836, 5 Stat. 10, 12); *Iowa* (June 12, 1838, 5 Stat. 235, 237); *Oregon* (Aug. 14, 1848, 9 Stat. 323, 325); *Minnesota* (March 3, 1849, 9 Stat. 403, 405); *New Mexico* (Sept. 9, 1850, 9 Stat. 446, 449); *Utah* (Sept. 9, 1850, 9 Stat. 453, 454); *Washington* (March 2, 1853, 10 Stat. 172, 175); *Nebraska* and *Kansas* (May 30, 1854, 10

these provisions in the various acts were codified in Section 1851 of the Revised Statutes (1873-1874) as follows: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." And see 48 U. S. C., secs. 77 and 562.

This Court, in construing these provisions, has held that the words "all rightful subjects of legislation" embrace all laws which are local and appropriate to territorial self-government. In *Maynard v. Hill*, 125 U. S. 190, 204, the Court took note of the essential similarity of the provisions in the organic acts defining the legislative powers of the territories, and held that what were "rightful subjects of legislation" was to be determined "by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented." In *Cope v. Cope*, 137 U. S. 682, 684, the Court, referring to such a provision in the Utah Organic Act, stated that, aside from the exceptions expressly contained in that Act, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State." Accord: *Hornbuckle v. Toombs*, 18 Wall.

Stat. 277, 279, 285); *Colorado* (Feb. 28, 1861, 12 Stat. 172, 174); *Dakota* (March 2, 1861, 12 Stat. 239, 241); *Arizona* (Feb. 24, 1863, 12 Stat. 664, 665); *Idaho* (March 3, 1863, 12 Stat. 808, 810); *Montana* (May 26, 1864, 13 Stat. 85, 88); *Wyoming* (July 25, 1868, 15 Stat. 178, 180).

648, 655-656. And in *Christianson v. King County*, 239 U. S. 356, 365, it was said that: "‘Rightful subjects’ of legislation * * * included all those subjects upon which legislatures have been accustomed to act." See also *Puerto Rico v. Shell Co.*, 302 U. S. 253, 260-262.

The grant of legislative power to deal with local matters, contained in the District of Columbia Organic Act of 1871 and in the other territorial organic acts, is thus "as broad and comprehensive as language could make it." *Puerto Rico v. Shell Co.*, *supra*, at 261. In effect, these acts constitute delegations by Congress to the territorial legislatures of all the local legislative power that Congress can constitutionally delegate. The power of Congress to make such delegations is indisputable. *Simms v. Simms*, 175 U. S. 162, 168; *Binns v. United States*, 194 U. S. 486, 491; *Miners' Bank v. Iowa*, 12 How. 1; *Christianson v. King County*, 239 U. S. 356, 365. Accordingly, this Court and the lower federal courts have consistently sustained the validity of territorial legislation dealing with subjects which, in a state, would ordinarily be dealt with by the state legislature. *Hornbuckle v. Toombs*, 18 Wall. 648 (procedural code limiting forms of action); *Maynard v. Hill*, 125 U. S. 190 (divorce statute); *Cope v. Cope*, 137 U. S. 682 (statute permitting illegitimate children to inherit); *Atchison, T. & S. F. Ry. v. Sowers*, 213 U. S. 55 (statute limiting tort claims); *Christianson v. King County*, 239

U. S. 356 (act escheating property); *Puerto Rico v. Shell Co.*, 302 U. S. 253 (anti-trust statute); *People of Porto Rico v. American R. R. Co.*, 254 Fed. 369 (C. A. 1) (act regulating freight rates); *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209 (C. A. 9) (statute abolishing dower).

It is particularly significant that several territories, acting under grants of legislative authority like that contained in the District of Columbia Organic Act of 1871, have enacted laws prohibiting racial discrimination in places of public accommodation. Alaska Compiled Laws, Section 20-1-3 (1949); Puerto Rico Laws, 1943, Act No. 131, pp. 404-406; ¹⁸ Virgin Islands, Act of September 12, 1950, Bill No. 1, 15th Legislative Assembly of Virgin Islands, 1st session. The constitutionality of such anti-discrimination legislation under the Fifth and Fourteenth Amendments is, of course, beyond question. *Railway Mail Association v. Corsi*, 326 U. S. 88, 93-94, 98; *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 31, 34; *Western Turf Association v. Greenberg*, 204 U. S. 359; *Rhone v. Loomis*, 74 Minn. 200; *People v. King*, 110 N. Y. 418.

If Congress sees fit to do so, the Constitution thus permits it to delegate power to the people

¹⁸ The Puerto Rico statute has been upheld by the Supreme Court of Puerto Rico as a proper exercise of the legislative power granted to the Territory by Congress. *People of Puerto Rico v. Suazo*, 63 Puerto Rico Reports 869.

of a territory to govern themselves and to enact local laws incident to self-government. In the past Congress has pursued the policy of delegating such local legislative power as soon as it found that the people of a territory were ready to assume this responsibility.¹⁰ The Constitution does not prevent Congress from treating the District of Columbia on the same basis. The Court has recognized that whether, and the extent to which, Congress should grant "home rule" and delegate authority to enact local laws in the territories, including the District of Columbia, is solely a matter of legislative policy:

It must be remembered that Congress, in the government of the Territories *as well as of the District of Columbia*, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the

¹⁰ In *Clinton v. Englebrecht*, 13 Wall. 434, 441, the Court noted that the Congressional policy underlying the broad grants of legislative authority to the territories "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority * * *."

District of Columbia, it has adopted a different mode of government, and in Alaska still another. *It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.*²⁰

V

The majority judges of the Court of Appeals took a different view of the constitutional power of Congress to delegate legislative authority to a local government in the District of Columbia. Congress, they held, cannot grant authority to enact "general legislation"; its delegatory authority is restricted to "municipal regulations and ordinances"; and "general legislation" includes enactments which "are in the nature of civil rights legislation," or which restrict freedom of contract, use of property, or carrying on a lawful calling. See pp. 5-7, *supra*.

This test of delegability, if accepted, would appear to preclude even a grant of authority to enact ordinances dealing with such clearly local matters as land zoning, regulation of building construction, public health regulation, etc. All of these limit freedom of contract, use of property, and the exercise of a lawful calling, but it could not be seriously contended that they are for that reason beyond the power of local governments.

²⁰ *Binns v. United States*, 194 U. S. 486, 491. (Italics added.)

In any event, this distinction between "general legislation" and "municipal regulations," which can find no support in the language or history of the constitutional provision, has no relevance to the problem of determining the power of Congress in relation to the District of Columbia. The distinction derives from the law of municipal corporations applicable to municipalities within a state. In a state, legislation of a municipality may possibly encroach upon powers reserved by the state legislature or interfere with the rights of other municipalities. Some matters, like the law of marriage and divorce, are usually regarded as of state-wide concern and as calling for uniform state-wide treatment, unless expressly delegated to municipalities. In the law of municipal corporations these are regarded as the subjects of "general legislation."²¹ On the other hand, matters which may appropriately be dealt with on a local basis by a municipality, in the absence of overriding state law to the contrary, are regarded as proper subjects of "municipal regulations." The essence of the distinction is geo-

²¹ This does not imply that a state could not delegate to a municipality authority to enact local laws dealing with a subject of "general legislation." The extent to which a state can delegate its power to a municipal government is a matter for its own determination. *Hunter v. Pittsburgh*, 207 U. S. 161, 178-179; *Milwaukee v. Raulf*, 164 Wis. 172, 183; *Duluth v. Cereny*, 218 Minn. 511, 515.

graphical. McQuillin, *Municipal Corporations* (3d ed. 1949), section 23.03.²²

The geographical basis underlying the distinction between "general legislation" and "municipal regulations" does not exist in the District of Columbia. In the District the powers of local government are geographically co-extensive with the entire area of the territory. In this crucial respect it is totally unlike the ordinary municipality within a state, and like a territory it combines elements both of a city and state. Congress itself described the District of Columbia, in the Act of July 16, 1790, 1 Stat. 130, establishing the District as the permanent seat of the government of the United States, as a "district of territory." (See footnote 23, *infra*.) And, in similar recognition of the fact that the District is not comparable to a city in a state, this Court has said "that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State"

²² As has been noted (footnote 16, *supra*), the Organic Act of 1871 expressly withheld from the Legislative Assembly of the District the power to deal with certain specified subjects. Section 17 contained a list of laws which could not be enacted by the Legislative Assembly. Among these were laws for granting divorces; changing the law of descent; and affecting the sale or mortgage of real estate belonging to minors. This enumeration of forbidden subjects of local legislation did not include "civil rights" or "anti-discrimination" laws. By plain implication, these were included within the residual category of "all rightful subjects of legislation" upon which the Assembly was empowered to act.

to which Congress can grant "subordinate legislative powers of a municipal character * * *".

Metropolitan Railroad v. District of Columbia, 132 U. S. 1, 9.

To be sure, there was a time, prior to 1871, when the District of Columbia comprised more than one municipality;²³ at that time an analogy

²³ The Act of July 16, 1790, 1 Stat. 130, provided that a "district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, * * * is hereby accepted for the permanent seat of the government of the United States."

When the United States took possession of the District of Columbia in December, 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; the laws of Virginia were continued over the former, and the laws of Maryland over the latter. Act of February 27, 1801, 2 Stat. 103.

Within part, but not all, of the area of the county of Washington were the cities of Washington and Georgetown. The latter had been incorporated by the Maryland legislature in 1789, and its status and powers were continued by Congress. Act of February 27, 1801, 2 Stat. 103, 108. In 1802 the city of Washington was incorporated by Congress and endowed with the usual powers of a municipal government. Its council, elected by the white male residents of the city, was empowered to pass by-laws and ordinances. Act of May 3, 1802, 2 Stat. 195; and see Act of February 24, 1804, 2 Stat. 254.

In 1805 Congress amended the charter of the city of Georgetown to provide for a board of aldermen and a common council, both to be elected by the "free white male citizens" of the city, and having the usual legislative powers of a municipal government. Act of March 3, 1805, 2 Stat. 332. In 1812 the charter of the city of Washington was amended in similar fashion. Act of May 4, 1812, 2 Stat. 721. The county of Washington was governed by a levy court com-

to the law of municipal corporations applicable in the states might have been relevant in determining the powers of each such municipality. But there could certainly have been no doubt then that the territory comprising such municipalities, i. e., the entire District of Columbia area, was so far as the power of Congress to delegate legislative authority was concerned—a territory and not an ordinary municipality. Obviously, the consolidation in 1871 of these municipalities into a single unified government for the District of Columbia did not alter its constitutional status, or diminish the power of Congress in relation to it.

In the District of Columbia, as it was constituted by the Act of 1871 and as it exists today, there can be no problem of conflicting laws enacted by different municipalities within the District. For this reason, laws passed by the Legislative Assembly defining crimes have been upheld, *United States v. May*; 2 MacArthur 512, notwithstanding that a municipal ordinance of such a nature, if enacted by a city within a state, might

posed of seven commissioners appointed by the President. Act of July 1, 1812, 2 Stat. 771. The county of Alexandria was re-ceded to Virginia by the Act of July 9, 1846, 9 Stat. 35.

This pattern of local government within the District continued, substantially unchanged, until the 1871 Organic Act established a single unified government for the entire District of Columbia. See Acts of May 15, 1820, 3 Stat. 583; May 17, 1848, 9 Stat. 223; August 6, 1861, 12 Stat. 320; March 3, 1863, 12 Stat. 799.

possibly be regarded as "general legislation" reserved, unless expressly delegated, as a subject for state-wide legislation.

Mr. Justice Holmes observed that "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."²⁴ In this case, the majority judges in the court below, without examining the considerations which differentiate the District of Columbia from an ordinary municipality within a state, and which make inapplicable the distinction between "general legislation" and "municipal regulations", assumed its applicability as a constitutional limitation on the powers of Congress in relation to the District of Columbia. Their main reliance was upon this Court's decision in *Stoutenburgh v. Hennick*, 129 U. S. 141. But that case held only that the Legislative Assembly had no power to enact a law restricting commerce with persons outside the District, and that the regulation of interstate commerce rested within the exclusive power of Congress. True, the Court's opinion in that case stated that Congress "could only authorize it [the District of Columbia] to exercise municipal powers * * *" (p. 147). But the preceding paragraph of the opinion leaves no doubt as to what was meant by "municipal powers":

²⁴ *Hyde v. United States*, 225 U. S. 347, 391 (dissent).

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

In its context, therefore, the statement that "general affairs" shall be managed "by the central authority" means simply that national matters, such as regulating interstate commerce, declaring war, raising armies, establishing uniform rules of naturalization, etc., are to be dealt with by Congress on a national basis, and not by a local legislature in the District on a local basis. The Court, in the same sentence, reiterated the "cardinal principle of our system of government, that local affairs shall be managed by local authorities * * *." It neither stated nor implied that there existed a class of "local affairs

of a general nature" which could not constitutionally be delegated to local authorities.²⁵

VI

Even if the distinction between "general legislation" and "municipal regulations" is assumed to be applicable, the Acts of 1872 and 1873 involved in this case should be upheld as valid "municipal regulations."²⁶

²⁵ *Metropolitan Railroad v. District of Columbia*, 132 U. S. 1, the only other decision of this Court cited in Chief Judge Stephens' opinion, held only that under the Act of June 11, 1878 (20 Stat. 102), the District of Columbia had a right to bring suit in its own name. That right was expressly granted by the 1871 Organic Act, and the Court construed the 1878 Act as also giving the District such right. Neither that case nor the decisions of the lower District of Columbia courts cited in the opinion of Chief Judge Stephens furnish any support for the asserted limitation on the power of Congress to delegate local legislative authority.

²⁶ Similarly, the Acts of 1872 and 1873 were not repealed by the 1901 Code, no matter what label is applied to them. Section 1640 of the Code provided that:

Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law * * * or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

It is not claimed that the 1872 and 1873 Acts were expressly or specifically repealed by any provision in the 1901 Code. The argument for repeal is based mainly on Section 1636 of the Code, which repealed "All acts and parts of acts of the general assembly of the State of Maryland, general and permanent in their nature" and "all like acts and parts of acts of the legislative assembly of the District of Columbia * * *". Expressly excepted in that section from repeal

both Part I and Part II.

Judge Cox in a letter to President Noyes, dated October 20, 1891, stated, among other things, as follows:

Our laws, as a whole, may be said to be half a century behind those of the States in their adaptation to modern business and social conditions.

The law of crimes and punishments needs overhauling, as well as our criminal procedure.

These changes are the objects which I have aimed at in preparing a code. I have taken existing laws as a starting point, and have endeavored to clear up obscurities in them and have added new features borrowed from other codes. I have had before me the codes of Maryland, Virginia, New York and Ohio, and have found many improvements common to them all, which ought long since to have been introduced here. I have also added original matter suggested by my own experience.

Having done this work without assistance and at odd moments, I cannot flatter myself that it is free from errors and defects; but I think that, as a whole, it will be an improvement upon the existing condition of things, and it would be desirable to have it enacted into law, even if it shall need to be amended afterward. The only possible way of having this done, as it seems to me, is to present it to Congress in a complete form, with the indorsement of the Board of Trade and the Bar Association,

Except as limited by constitutional or statutory prohibitions, express or implied, the delegated power of municipalities to enact regulatory ordinances is as broad as the police power of a state. *City of Phoenix v. Michael*, 61 Ariz. 238, 243; *Shepherd v. McElwee*, 304 Ky. 695, 698;

were, *inter alia*, acts "relating to * * * police regulations, and generally all acts and parts of acts relating to municipal affairs only * * *."

As is shown by the many cases cited in the opinion of Chief Judge Cayton in the Municipal Court of Appeals (R. 34), the continuing validity of penal laws enacted by the Legislative Assembly, unless expressly superseded, has consistently been recognized by Congress and the courts of the District. See, especially, *Johnson v. District of Columbia*, 30 App. D. C. 520; upholding a conviction under a cruelty-to-animals statute enacted by the Legislative Assembly in 1871. The Court of Appeals for the District of Columbia held that that statute, which does not essentially differ from the 1872 and 1873 Acts here involved, was saved from repeal by the "police regulations" exception of the 1901 Code.

In any event, the Acts of 1872 and 1873 are squarely within the exception of "acts relating to municipal affairs". The words "municipal affairs" in this context were not limited to matters pertaining to municipal organization and internal administration but were intended to save all existing acts and ordinances properly comprising a municipal code. See H. Rep. No. 1017, 56th Cong., 1st Sess.; *Carr v. Corning*, 182 F. 2d 14, 18, 19 (C. A. D. C.); cf. *Porter v. Santa Barbara*, 140 Cal. App. 130, 35 P. 2d 201; *Home Tel. & Tel. Co. v. Los Angeles*, 155 Fed. 554, 564 (C. C. S. D. Cal.). This is evidenced by the further fact that Section 1636 stated that "acts relating to municipal affairs only" should include "those regulating the charges of public-service corporations", and that the section expressly saved from repeal "acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of

People v. Sell, 310 Mich. 305, 315; *Schultz v. State*, 112 Md. 211, 215-218. The regulation of service in restaurants and other places of public accommodation is traditionally regarded as a proper subject of local regulation. See, e. g., *Cooper v. District of Columbia*, MacArthur & Mackey 250, 259, 260. If a municipality can regulate a restaurant's sanitary conditions, in the interest of the public health; if it can regulate the construction of its building, its seating arrangements, and the number of its patrons, in the interest of the public safety; then surely it can

the District of Columbia, or their subordinates or employees * * *. See, generally, *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 72.

Judge Prettyman's alternative ground, that the 1872 and 1873 Acts are not now enforceable because they have been "abandoned" by reason of the long failure to enforce them (R. 90), is clearly without substance. Judge Fahy correctly pointed out in the dissenting opinion (R. 114) that the theory of repeal by abandonment rests upon the premise that the 1872 and 1873 Acts were mere conditions imposed upon licenses by the licensing authority. The Acts themselves demonstrate the error of this premise. In express terms they impose an affirmative legal duty of nondiscrimination in service upon owners of restaurants in the District, and make violation of that duty a penal offense punishable by fine and forfeiture of license. While disavowing such a purpose, Judge Prettyman is in effect applying a doctrine, for which he conceded there is no authority whatsoever, of implied repeal of legislation because of nonenforcement. Cf. *Kelly v. Washington*, 302 U. S. 1, 14: "Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand."

regulate or prohibit, in the interest of the public welfare, any discrimination in service on account of race or color. An anti-discrimination regulation is not essentially different from these other types of regulation. All of them affect the rights and duties of a restaurant owner; all limit his freedom of contract and his use of property. In each case, however, only local regulation is involved.

Moreover, as is abundantly demonstrated in the dissenting opinion of Judge Fahy, municipal governments throughout the country have exercised the power to enact ordinances dealing with racial discrimination in public places. Many of these prohibit racial segregation; others require segregation. Apart from the question of their validity under the Fourteenth Amendment,²⁷ ordinances requiring racial segregation have been upheld as within the bounds of municipal power. These cases are cited in the opinion of Chief Judge Stephens at R. 82.

Chief Judge Stephens stated that the cases holding ordinances requiring racial segregation to be within the scope of municipal power are not authorities in support of the validity of ordi-

²⁷ As the Court is aware, it is the position of the United States that racial segregation enforced or supported by law is unconstitutional. See briefs for the United States in the "school segregation" cases now pending before the Court (Nos. 8, 101, 191, 413, 448) and in *Henderson v. United States*, 339 U. S. 816; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637.

nances prohibiting segregation. Those cases, he said, are "distinguishable from the instant case because in such cases the ordinances were in accord with a local custom of racial segregation on account of color and were held valid upon the theory that they were for the purpose of preserving peace and good order which would likely be interfered with by racial association." On the other hand, the "enactments involved in the instant case were in conflict with local custom in respect of race association and cannot therefore be justified as in aid of the preservation of peace and order." (R. 83.) ²⁸

It would appear that under this test an ordinance is "municipal" and valid if a court finds it is in accord with "local custom" and will

²⁸ Chief Judge Stephens assumed it to be a fact, so clear and indisputable that a court could take judicial notice of it without receiving evidence, that "there was general discrimination on account of color at the time the enactments in question in the instant case were passed" (R. 81), and that such "a custom of race disassociation in the District" (R. 88) has continued to this day.

The dissenting opinion of Judge Fahy, however, shows the lack of factual support for the conclusion that there is, and has been, "a custom of race disassociation in the District" so general and well-known that a court can properly take judicial notice of it (R. 120):

It is enough to point out that custom has not moved away from equal treatment, leaving these regulations derelicts of the past. Custom has moved toward equal treatment, as is shown by developments of recent years in the Government, in the armed services, in industry, in organized labor, in educational institutions, in sports, in the theatre, and in restaurants in this community, as examples.

help preserve peace and order; if not, the ordinance is "general" and invalid. This seems to mean that no ordinance could be regarded as a valid exercise of municipal authority unless its purpose and effect were to preserve peace and order. But, obviously, the fact that certain non-lawabiding elements might resort to violence in resisting a measure they disapprove cannot establish its invalidity as beyond the limits of municipal power. If Chief Judge Stephens' opinion means that the validity of an ordinance depends upon whether it is in accord with "local custom" as judicially noticed by a court, it would follow that the more widespread and noxious a local evil is, the less would be the power of a municipality to deal with it: a municipal law would be invalid if a court finds it in conflict with "local custom," no matter how deplorable such custom is and how strongly the community desires to alter it.

Judge Fahy, on behalf of the four dissenting judges in the court below, gave the incisive answer to this contention: "If a municipal ordinance may require segregation it may require equal treatment. * * * There is no doctrine known to the law that validity or invalidity of legislation rests upon whether or not it conforms with prevailing custom. Such a consideration goes to the wisdom or policy of the legislation, not to its validity." (R. 108.)

CONCLUSION

The questions of constitutional law and statutory construction presented by this case are of

substantial national importance and warrant review by this Court. The rulings of the Court of Appeals are in conflict with controlling decisions of this Court. The decision below casts a cloud upon the constitutional power of Congress to grant home rule to the District of Columbia and delegate to a local legislature authority to enact local laws. The Court of Appeals has held unenforceable two Acts, enacted by the Legislative Assembly of the District of Columbia during a period when the District had a form of self-government, which made it unlawful for owners of restaurants and other places of public accommodation within the District of Columbia to refuse service to persons on account of race or color. The decision has created doubt and uncertainty as to the extent to which Congress can grant to the residents of the District of Columbia authority to deal with the serious problems arising from racial discrimination in the District.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HERBERT BROWNELL, Jr.,

Attorney General.

ROBERT L. STERN,

Acting Solicitor General.

PHILIP ELMAN,

Special Assistant to the Attorney General.

MARCH 1953.

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No. 617

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

DISTRICT OF COLUMBIA, PETITIONER

V.

JOHN R. THOMPSON COMPANY, INC.

LEGISLATIVE HISTORY OF 1901 CODE FOR DISTRICT OF COLUMBIA

SUBMITTED BY WASHINGTON BOARD OF TRADE, AMICUS CURIAE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, Petitioner

v.

JOHN R. THOMPSON COMPANY, INC.

LEGISLATIVE HISTORY OF 1901 CODE FOR DISTRICT OF COLUMBIA

SUBMITTED BY WASHINGTON BOARD OF TRADE, AMICUS CURIAE

This memorandum is being submitted to the Court pursuant to leave granted to the undersigned counsel at the conclusion of his argument on Friday, May 1, 1953.

The compiled statutes in force in the District of Columbia, compiled and distributed by order of the Supreme Court of the District of Columbia on June 2, 1894, in general term, as directed by Act of Congress of March 2, 1889, Chapter 392, contains copies of the Acts of the Legislative Assembly of 1872 and 1873 in question in this case. See Chapter 16, CRIMES AND OFFENSES, Pages 183-185.

The Eighth Report of the Washington Board of Trade (1898) contains letter of Judge Walter S. Cox transmitting the Code prepared by him to President Theodore Noyes of the Board of Trade. See bound volume in Public Library, in original pamphlet form with outside binding added. The cover page shows this Code of Law was prepared at the request of the Bar Association and the Board of Trade of Washington by Walter S. Cox. It contains

the best representatives of the intelligent sentiment of the people of the District.

Judge Cox's said letters appears in full in said report of the President of the Board (pp. 23, 24). The President's report contained, among others, the following statements:

This letter notes the completion of Judge Cox's formidable task. Arrangements have been made by the Board of Trade and the Bar Association jointly to print the proposed code in order that it may be examined and considered prior to its adoption by the Board and Bar Association, and the urgent request for its enactment into law by Congress.

IMPORTANCE OF CODIFICATION.

No other legislation to be brought before Congress at its approaching session is so important to the District's welfare as this. * * * this codification goes over the entire body of local law, lopping off what is obsolete or obsolescent * * *.

* * * Justice Cole and other judges at the Board Meeting of 1895 demonstrated that the District law was still a museum of antiquities. Representative Grosvenor at an Arlington meeting of the Board afterward dangled in our faces some statutory antediluvian monstrosity at that date still living and flourishing in the District, and pledged himself, at the proper time, to assist vigorously in relieving the District of these fossil statutes.

Washington Board of Trade, Ninth Report (November 1899), President Noyes reported progress on the Code, including the following:

Since the date of my last year's annual report,

in which was noted the completion of Judge Cox's task of codifying the laws of the District, and in which was discussed at length the importance and value of this work, substantial progress has been made toward the goal of the enactment of the code into law. First, the code, as framed by Judge Cox, was printed by the Board of Trade and the Bar Association in conjunction, and copies were distributed for careful and thorough consideration. The Legal Committee of the Board of Trade and an exceedingly able committee from the Bar Association undertook the study of the details of the proposed law. The Bar Association committee appointed numerous sub-committees of members of the association, each of which considered and reported upon a particular section or chapter of the code. So great was the interest felt by everyone in this public-spirited task that the courts of the District took a recess for several weeks in order that uninterrupted consideration might be given by bench and bar to the code. Finally the amended code was approved by the Bar Association committee and was submitted as a Senate bill shortly before adjournment for the session, in order that it might be printed for convenience of consideration. This bulky bill is now to receive its final touches, and the formal approval of the Bar Association and the Board of Trade. It will then be in condition to be pushed from the very opening of Congress, energetically and systematically, everybody cooperating, until it becomes a law.

(It may or may not be known to the Court that Mr. Theodore Noyes was a lawyer, who as a young man practiced law in South Dakota for several years before he was called back to Washington to take the position of editor of the Washington Star. He never lost the feel of being a lawyer and as such had the most patriotic interest in bringing about the codification of the laws of the District of Columbia.)

The Bill referred to by Mr. Noyes was Bill S. 5530, which was introduced by Senator McMillan, February 18, 1892, Cong. R.-Senate 2041.

The entry in the record is as follows:

Mr. McMillan introduced a Bill (S.5530) to establish a Code of Law for the District of Columbia; which was read twice by its title, and referred to the Committee on the District of Columbia.

That was in the 55th Congress, 3rd Session. The index for that session shows no other action taken on that Bill. There was no later session of that Congress. This Bill is the one referred to in the brief for the United States, Page 68.

The Bill which was passed by Congress and signed by the President, and became the Code of 1901, was H. R. 9835 of the 56th Congress, 1st Session.

This Bill was introduced by Mr. Jenkins on March 21, 1900, as shown by the following entry:

By Mr. Jenkins:

A Bill (H.R. 9835) to establish a Code of Law for the District of Columbia -- to the Committee on the District of Columbia.

Cong. R.-House, March 21, 1900, Page 3153.

The Bill was reported by Mr. Jenkins from the Committee on the District of Columbia, to the House, with amendment, accompanied

by Report No. 1017; which Bill and Report were referred to the House Calendar. Cong. R.-House, April 14, 1900, page 4205.

The Bill was called up in the House on April 30, 1900, briefly discussed, and the reading of the Bill by sections for amendment postponed to another day, id., 4859.

On May 28, 1900, the Bill was read. Evening sessions were ordered for the consideration of the Bill, extending from 8:00 to 10:30 P.M., id., Page 6178.

On the night of May 28, 1900, the Bill was read, Committee amendments and other amendments then offered were considered and acted upon. The Bill as amended was ordered to be engrossed and read a third time, which was done and the Bill was passed, id., Pages 6180-6182.

The Bill was received in the Senate May 31, 1900, read twice by its title, and referred to the Committee on the District of Columbia, id., Page 6265.

On December 15, 1900, Senator Pritchard reported the Bill, making the following statement:

I am directed by the Committee on the District of Columbia to whom was referred the Bill (H.R. 9835) to establish a Code of Law for the District of Columbia, to report it with amendments. I reserve the right to offer certain amendments to the Bill. (id., Page 333).

This oral statement of Senator Pritchard appears to have been the only Senate Report on the Bill.

On January 22, 1901, Senator Stewart endeavored to have the Bill read at night, but there was objection, id., Page 1287.

On January 29, 1901, Senator Stewart again endeavored to have the Bill read, but there was objection, id., Page 1607.

On February 13, 1901, the Senate held an evening session at which the Bill was read to the end of Chapter 41, when the Senate adjourned, id., 2366.

On February 14, 1901, at an evening session the reading of the Bill was completed, id., 2413.

February 16, 1901, Senator Fritchard endeavored to have the Bill read in full, but there was objection, id., 2501.

On February 28, 1901, Senator Fritchard again endeavored to get the Bill up, but there was objection, id., 3197.

March 2, 1901, the Bill was next in order and there being no objection the Senate as Committee of the Whole, resumed consideration of the Bill. Several amendments were added to the Bill, which provided for ten Justices of the Peace, certain matters of procedure, and insurance companies.

An amendment was added providing a fine of not more than \$100.00 or imprisonment of not more than six months, or both, for anyone obtaining lodging, food or accommodations at an inn, boarding house, or lodging house with intention to defraud and absconding without paying for the same.

The final amendment then made was the 8th exception to Sec. 1636.

The Bill was read a third time and passed.

On motion of Senator Wellington, the Bill was reconsidered and two other amendments, relating to marriage and divorce, were added, and the Bill was again read the third time and passed, id., 3496-7.

On March 2, 1901, the Bill, as passed by the Senate, was reported to the House, read by its title, the amendments were debated, especially the one making it a misdemeanor to fail to pay a bill at a boarding house incurred with intent of defrauding the boarding house keeper and then leaving without paying.

Chairman Babcock of the House Committee on the District of Columbia, during the debate, pointed out that the codification made some change in the existing laws, and said that it was not the work of a Special Committee of Congress; that the original draft of the Code was prepared by the Supreme Court of the District of Columbia; that one of the Judges of that Court was appointed for this work and was engaged upon it for several years; that it was then submitted to the Bar Association of the District and approved by them; and then it was submitted to the House and Senate for their action.

The Senate amendments were concurred in and the Bill was passed, id., Pages 3585-6; and on the same day the Bill was enrolled and signed by the President of the Senate, id., Page 3555. On the same day the enrolled Bill was signed by the Speaker of the House, id., Page 3603.

On March 3, 1901, the Bill was signed by the President, id., Page 3603.

The Code prepared, as stated by Chairman Babcock (supra) was submitted to the House of Representatives in its complete form, embracing both Part I and Part II. In the preface to it (vii) Judge Cox stated that he had considered the Acts of the Legislative Assembly of the District, during the years 1871, 1872 or 1873, as found in "Mr. Abert's valuable compilation". He also said:

I have carefully examined all of this law, and in the work now published I have treated every subject provided for by it, except such matters as were of a transitory character and such as may be called obsolete.

Judge Cox also said:

"The Code is divided into two parts. The first only is of immediate interest to our profession and litigants. * * * (Page viii)

In the formal report on the Bill to the House of Representatives made by Congressman Jenkins (H.R. No. 1017, 56th Congress, 1st Session, House Reports, Vol. 4), many amendments are set forth.

Judge Cox's preface to his work is quoted at length, and the report continued in the following language:

The first of the two parts referred to by Justice Cox included the general statutes, laws relating to public and private rights and remedies. The second part referred to the organization of the municipal corporation known as the District of Columbia and to municipal affairs generally.

The report records the work of the committees of lawyers who worked on the Code giving their names. The list included Senator Newlands of Nevada, Chief Justice R. R. Alvey of the

Court of Appeals of the District of Columbia and A. L. Britton whose firm of Britton and Gray was as well known in this Court as any other firm of lawyers in the United States (Page 4-5).

The report records the first introduction of the Code as Senate Bill 5530, 55th Congress, 3rd Session, and in that connection stated:

This action was taken with the approval also of the Bar Association at a special meeting called for the purpose, with the understanding at the time with the corresponding committee of the Board of Trade that after a final revision should have been completed the whole work should be submitted to the Board of Trade through its special committee.

The report then records that the Code so introduced in the Congress was gone over by committee of the Bar Association and three justices of the Supreme Court of the District of Columbia who spent six weeks on the work, and said:

This joint committee of the Bench and Bar also examined Albert's compilation of the statutes in force in the District of Columbia, the revised statutes of the District and the Acts of Congress enacted December 1873 - the date of the revised statutes - for the purpose of discovering whether any important omission had been made. (Page 5)

The report continued:

Like other Codes, this work deals only with those general and permanent statutes which affect the personal and property rights of the people at large and the procedure by which these rights are to be established and defended.

It should be noted that the Bill H.R. 9835 as passed contained a chapter entitled Crimes and Punishments in which section 837 covered innkeepers. It is noted in the debates that Representative Jenkins spent months on the bill.

In view of the entire history of the Code, there is no possibility that the subject of restaurants and the Acts of the Assembly of 1872 and 1873 were not intentionally excluded from the Code, nor that this subject was reserved to be later inserted in Part II, which never included it.

Respectfully submitted,

E. F. Colladay,
General Counsel
Washington Board of Trade
Attorney for
Amicus Curiae

D.C. Colladay,
of Counsel

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IN THE
Supreme Court of the United States
October Term, 1952

No. 617

DISTRICT OF COLUMBIA,

v.

JOHN R. THOMPSON COMPANY, INC.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

THURGOOD MARSHALL,
ROBERT L. CARTER,
DAVID E. PINSKY,
*Counsel for the N.A.A.C.P. Legal Defense
and Educational Fund, Inc.*

IN THE
Supreme Court of the United States

October Term, 1952

No. 617

DISTRICT OF COLUMBIA,

v.

JOHN R. THOMPSON COMPANY, INC.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

*To the Honorable, the Chief Justice of the
United States and the Associate Justices
of the Supreme Court of the United States:*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., pursuant to Rule 27 of the Rules of the Supreme Court of the United States, moves for leave to file a brief as *amicus curiae* in the case of *District of Columbia v. John R. Thompson Company Inc.*, No. 617 in this Court.

I. Consent to file such brief has been requested of the parties. The District of Columbia granted consent. The John R. Thompson Company, Inc., has refused consent.

II. Movant is a national organization engaged in combatting racial discrimination in the United States. One of its principal purposes is to secure judicial recognition and enforcement of federal, state and local enactments prohibiting discrimination based on race or color.

Each of the 280,000 Negroes residing in the District of Columbia has a direct personal stake in the outcome of

this case) The Equal Service Acts of 1872 and 1873 gave all persons the right to receive the essential public services provided by hotels, restaurants, barber shops and other places of public accommodation without discrimination on account of race or color. If the decision of the court below invalidating these Acts is upheld, Negro residents particularly will lose vital and precious personal rights.

The impact of this decision on Negroes residing outside the District of Columbia will be equally as great. The District of Columbia, the seat of our government, attracts innumerable visitors who come to observe the processes of democratic government in action and to see the monuments and memorials which symbolize our history. As travellers, they are dependent on hotels and restaurants for lodging and food. Unless they can be assured such essential services, their privileges as citizens to visit the seat of our government will continue to be seriously abridged.

As vital as the direct effect of this decision will be, its indirect repercussions will be even more significant. The District of Columbia symbolizes American democracy. So long as racial discrimination in places of public accommodation is sanctioned by law in the heart of the nation, efforts to eliminate it in other areas will necessarily encounter stiff resistance. Once it is clear, however, that racial discrimination in our capital has no legal warrant, the great mass of national opinion seeking to eliminate racial barriers will be swelled with new moral strength and vigor. Thus, the elimination of racial discrimination in places of public accommodation in the District of Columbia is especially significant to America's progress toward full equality for all persons.

III. Movant has not seen the briefs on the merits in this Court and it is of the opinion that these have not yet been submitted. However, it does not believe that the following questions of law will be adequately presented.

A. Movant does not believe that the parties, in dealing with the law with respect to municipal corporations, will give sufficient attention to the public policy considerations which favor local governmental effort toward the elimination of racial discrimination and the broad national policy against racial discrimination.

1. The power of local communities to deal with the problems of racial discrimination on a local level is rendered extremely questionable in the light of the decision of the Court of Appeals. Until now the validity of local enactments in the field of civil rights has never been seriously questioned. In recent years, many communities have attempted to deal with various facets of racial discrimination by the enactment of local ordinances. Fair employment practice ordinances are now in effect in Chicago, Minneapolis, Cleveland, Youngstown, Philadelphia, Milwaukee, and many other cities, thus insuring to hundreds of thousands of Negroes the right to be free from discrimination in employment. The validity of these ordinances has suddenly become suspect in the light of decision of the Court of Appeals. While their legality is a matter of state law, the decision of the court below stands as a formidable precedent. Moreover, the status of territorial acts enacted in Alaska, Puerto Rico, and the Virgin Islands prohibiting racial discrimination in places of public accommodation now becomes uncertain. If this decision stands, much of the substantial grass roots progress in eliminating racial discrimination will be seriously imperiled.

2. In deciding that the Legislative Assembly for the District of Columbia had no power to enact the Equal Service Acts of 1872 and 1873, the Court below distinguished the authorities which hold that ordinances requiring segregation are within the bounds of municipal power. This distinction is predicated on the ground that such ordinances are in accord with custom and, hence, necessary to the preservation of peace and order. Movant believes that

this rationale is unsound and extremely prejudicial to the rights of all minorities, for local custom may often be in conflict with the rights of a minority and even the public policy of the state at large.

The theory of the Court below imports into the law of municipal corporations a new and confusing doctrine. If it prevails, the validity of anti-discrimination ordinances may depend on a factual determination as to whether they are in accord or in conflict with local custom. Movant does not believe that the full effect of this theory on civil rights generally will be adequately explored by the parties. Moreover, movant does not believe that the parties will give adequate consideration to the broad national policy against racial discrimination of every kind.

B. A majority of the Court of Appeals did not concur in the opinion of Chief Judge Stephens. As a result, the separate concurring opinion of Judge Prettyman takes on added significance. The position of Judge Prettyman is that, assuming the Legislative Assembly had the power to enact the Equal Service Acts, they were, in effect, municipal ordinances which have now lost all force and effect through abandonment and non-user. Ordinances and statutes protecting minority rights may often be frustrated by apathy or even hostility on the part of some law enforcement officials. Under the theory set forth in the concurring opinion below, such prolonged apathy or hostility may result in nullification of the enactment.

Movant does not believe that the impact of this doctrine on the rights of Negroes generally and its total ramifications will be fully presented. And it does not believe that the parties, in dealing with this issue, will give adequate consideration to the broad national policy against racial discrimination of every kind.

IV. Movant submits that the above considerations are relevant to the issues at the bar and to the particular holding which may emanate from this Court.

WHEREFORE MOVANT moves for leave to file a brief herein as *amicus curiae*.

Respectfully submitted,

THURGOOD MARSHALL,

ROBERT L. CARTER,

DAVID E. PINSKY,

*Counsel for the N.A.A.C.P. Legal Defense
and Educational Fund, Inc.*

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IN THE
Supreme Court of the United States

No. 617

DISTRICT OF COLUMBIA,

v.

JOHN R. THOMPSON COMPANY.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE**

RINGGOLD HART,

JOHN J. WILSON,

JO V. MORGAN, JR.,

815 Fifteenth Street, N. W.,

Washington 5, D. C.,

Counsel for Respondent.

WHITEFORD, HART, CARMODY, & WILSON,

Of Counsel.

IN THE
Supreme Court of the United States

No. 617

DISTRICT OF COLUMBIA.

v.

JOHN R. THOMPSON COMPANY.

**OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE**

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Respondent John R. Thompson Company, Inc. refused consent to the request of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. to file ~~a brief amicus curiae~~ solely because the very short time between the granting of certiorari and the date set for oral hearing would not permit respondent time to study and reply to such brief should reply be necessary.

Respondent opposes the motion of N.A.A.C.P. Legal Defense Fund, Inc. for the same reason.

Respectfully submitted,

RINGGOLD HART,

JOHN J. WILSON,

JO V. MORGAN, JR.,

815 Fifteenth Street, N. W.,
Washington 5, D. C.,

Counsel for Respondent.

WHITEFORD, HART, CARMODY, & WILSON,

Of Counsel.

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No. 1617

In the Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA, PETITIONER

JOHN R. THOMPSON COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, PETITIONER

v.

JOHN R. THOMPSON COMPANY, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Municipal Court quashing the information (R. 4) is not reported. The opinions in the Municipal Court of Appeals (R. 25-53) are reported at 81 A. 2d 249. The opinions in the United States Court of Appeals for the District of Columbia Circuit (R. 60-120) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1953 (R. 121). The petition for a writ of certiorari was filed on February

20, 1953, and was granted on April 6, 1953. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two laws which made it a criminal offense for owners of restaurants and certain other places of public accommodation (hotels, barber shops, ice-cream parlors, bar-rooms, and bathing-houses) to refuse to serve any "respectable well-behaved" person because of his race, color, or previous condition of servitude.¹ The Court of Appeals for the District of Columbia Circuit has held in this case that these two laws are not enforceable. The questions presented are:

1. Whether the Acts of 1872 and 1873 were valid when enacted.
2. If so, whether they are still in full force and effect.

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

The pertinent constitutional and statutory provisions are set out in the Appendix, *infra*, pp. 89-100.

¹ Violation was made punishable as a misdemeanor by a \$100 fine. As an additional sanction, the Acts provided that an offender should forfeit his license for one year (Appendix, *infra*, pp. 96-100).

STATEMENT

On July 27, 1950, three persons entered a restaurant owned by respondent in Washington, D. C. Two of these persons were colored, and for that reason they were not served. The Corporation Counsel for the District of Columbia thereafter filed in the Municipal Court an information in four counts (R. 1-3), charging violations of the Acts of the Legislative Assembly of the District of Columbia enacted on June 20, 1872, and June 26, 1873 (Appendix, *infra*, pp. 96-100).

In the Municipal Court, Judge Myers quashed the information on the ground that the 1872 and 1873 Acts had been held by him in an earlier prosecution involving the same defendant (R. 4-17) to have been repealed by implication as a result of the enactment by Congress of the Organic Act of June 11, 1878, 20 Stat. 102 (R. 3-4).

On appeal, a majority of the judges of the Municipal Court of Appeals held that the 1872 and 1873 Acts were valid when enacted, and that the latter Act (but not the former, in so far as it related to restaurants) had not been repealed.²

² Chief Judge Cayton was of the opinion that both the 1872 and 1873 Acts were valid and still in effect. (R. 26-37). Judge Clagett agreed as to the validity of both Acts, but thought that the 1873 Act had superseded the 1872 Act, so far as restaurants are concerned. (R. 37-52.) Judge Hood, dissenting, thought that both Acts were void *ab initio* (R. 52-53).

Accordingly, the order of the Municipal Court, in so far as it dismissed the counts based on the 1873 Act, was reversed; in so far as it dismissed the first count, based on the 1872 Act, the Municipal Court's order was affirmed. (R. 36-37.)

On cross-appeals by both respondent and the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held that the entire information should be dismissed. (R. 89, 121.) The judgment of the Court of Appeals, holding that the Acts of 1872 and 1873 are not enforceable, was concurred in by five judges constituting a majority of the full court. The grounds for this holding are set forth in the separate opinions of Chief Judge Stephens (on behalf of Judges Clark, Miller, Proctor, and himself)³ and Judge Prettyman (with whom Judge Miller also concurred).⁴ Judge Fahy wrote a dissenting opinion in which Judges Edgerton, Bazelon, and Washington joined.⁵

³ R. 61-89.

⁴ R. 89-100.

⁵ R. 100-120. The dissenting judges were of the view that the 1873 Act was valid when enacted and had not been repealed. They agreed with Judge Claggett of the Municipal Court of Appeals (see footnote 2, *supra*) that the provisions in the 1873 Act relating to restaurants were in substitution for those contained in the 1872 Act, and hence superseded the latter Act *pro tanto*. For the reasons set out in footnote 46, *infra*, the Government, while agreeing with this conclusion of Judge Claggett and the dissenting judges in the court below, does not believe that the question whether the

Except in one relatively minor respect (see footnote 8, *infra*), Judge Prettyman's views on the basic issues in the case coincide with those expressed by Chief Judge Stephens. Both opinions agree on the following propositions:

(1) Congress lacks power under the Constitution to delegate authority to the District of Columbia to enact "general legislation"; only the authority to enact "regulatory municipal ordinances" can constitutionally be delegated.⁶

1873 Act repealed the 1872 Act, so far as restaurants are concerned, need be reached and decided by this Court in the present posture of the case.

⁶ See opinion of Chief Judge Stephens at R. 79, 82. The opinion of Judge Prettyman is equally explicit in expressing the view that Congress can delegate only the authority to enact "municipal regulations" and not "general legislation":

"* * * There are two possible views. Either they [the 1872 and 1873 Acts] were general legislation, *e. g.*, relating to civil rights, use of property, validity of contracts, or similar subjects; or they were municipal ordinances regulatory of licensed businesses. * * *

"The judges who join Chief Judge Stephens take the former view. There are reasons, which he describes, which support that view. From that premise I think the next steps in his opinion follow inevitably. If the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond the power permitted a municipal body in the District of Columbia by the Constitution * * *.

* * * They [the dissenting judges] say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative

(2) Although Congress in the Organic Act of 1871 (16 Stat. 419) empowered the Legislative Assembly of the District of Columbia to deal with "all rightful subjects of legislation within said District," this delegation of legislative power could not, and did not, include authority to enact local anti-discrimination laws; such laws come within the proscribed category of "general legislation" even though applicable only within the District of Columbia.

(3) To the extent that the Acts of 1872 and 1873 constitute "general legislation," they were only in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone.

* * * * *
 " * * * If they [the 1872 and 1873 Acts] were general legislation they were void from the beginning * * * "

(R. 89, 97, 99.)

The line between "general legislation" and "regulatory municipal ordinances" drawn by the majority judges of the Court of Appeals is concededly imprecise. (See footnote 8a, *infra*.) Chief Judge Stephens admitted "that, for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty" (R. 79). He thought it clear, however, that the Acts of 1872 and 1873 were "general legislation" because they limited the freedom of the owner of a restaurant "in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling" (R. 79) and were "in the nature of civil rights legislation" (R. 81).

Judge Prettyman agreed that acts "relating to civil rights" come within the prohibited class of "general legislation." He cited, as examples of "general legislation," those "relating to civil rights, use of property, validity of contracts, or similar subjects" (R. 89).

not only invalid when enacted but for the same reason were also repealed by the District of Columbia Code of 1901 (31 Stat. 1189).⁸

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents two separate and distinct issues: (1) Were the Acts of 1872 and 1873 valid when enacted by the Legislative Assembly of the District of Columbia? (2) If so, have they been repealed either by the provisions of the District of Columbia Code of 1901 (31 Stat. 1189) or by reason of the failure to enforce them over a long period of years?

⁸ The conclusion that the Acts of 1872 and 1873 were "general legislation" was regarded by the majority judges as also determinative of the question of repeal under the 1901 Code. Chief Judge Stephens expressly stated (R. 85) that the finding that the Acts of 1872 and 1873 were "general legislation" required the further conclusion that they were repealed by the 1901 Code. Judge Prettyman concluded that the 1872 and 1873 Acts are unenforceable, whether regarded as "general legislation" or "regulatory municipal ordinances." His reasoning was as follows: If the Acts of 1872 and 1873 constituted "general legislation," they were, for the reasons stated by Chief Judge Stephens, invalid when enacted, and in any event repealed by the 1901 Code; if the Acts were "regulatory municipal ordinances" and valid when enacted, they "must be deemed by the courts to have been abandoned by the licensing authority" (R. 89-90).

A

The validity issue depends upon the answers to two subsidiary questions: (a) As a matter of construction, did the District of Columbia Organic Act of 1871 (16 Stat. 419) empower the Legislative Assembly to enact laws of this character? (b) If so, did Congress act within its constitutional powers in delegating such authority to the District of Columbia?

Section 18 of the Organic Act of 1871 provided that "the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act * * *". Construing substantially identical provisions in other territorial organic acts, this Court has held in numerous cases that they constitute delegations by Congress of comprehensive authority to legislate on local matters. The language of the Organic Act of 1871, interpreted in accordance with these decisions, clearly empowered the Legislative Assembly of the District of Columbia to enact local anti-discrimination laws like the Acts of 1872 and 1873.

The delegation of local legislative authority in the Organic Act of 1871 was constitutional. The decisions of this Court establish that Congress has ample power under the Constitution to delegate to the federal territories, including the District of Columbia, authority to legislate on local

matters. In this respect the District of Columbia does not differ from other federal territories. Article I, Section 8, clause 17 of the Constitution gives Congress power to exercise "exclusive" legislation over the District; but the word "exclusive" does not mean "non-delegable." Its purpose was simply to prevent the ceding states from exercising legislative authority in the territory embraced within the District. It does not, as the Court has recognized, preclude Congress from establishing a local government in the District with full authority to legislate on subjects of local concern. Moreover, that provision of the Constitution gives Congress all the powers which may be exercised by a state in dealing with one of its cities, and there is no principle of constitutional law which forbids a state to delegate authority to a city to enact local anti-discrimination legislation.

- In the court below and in the Municipal Court of Appeals, it appears to have been generally assumed that the validity issue hinged upon whether the 1872 and 1873 Acts were "general legislation" or "municipal regulations." The applicability of this distinction, as a criterion for determining the validity of the Acts, seems to have been accepted even by some of the judges who found the Acts valid. Thus, in the Municipal Court of Appeals both Chief Judge Cayton (R. 28-32) and Judge Clagett (R. 44-47), while

concluding that the Acts were valid, accepted the premise that they would be invalid if they were "general legislation." In the court below the dissenting opinion of Judge Fahy expressly put to one side the question "whether Congress intended to grant the Legislative Assembly power to enact laws of a character more general than municipal ordinances or whether such an intent could constitutionally be carried out in this District" (R. 109). Since the majority judges in the court below conceded that the Legislative Assembly could unquestionably enact "municipal regulations" to the same extent as an ordinary municipality possessing usual municipal powers, the dissenting judges thought it unnecessary to go further than to hold that the provisions of these Acts were "regulations of a municipal or local character" which could validly be enacted by an ordinary municipality within a state, unless specifically barred by state law.

The United States agrees, for the reasons stated in the dissenting opinion of Judge Fahy, that the Acts of 1872 and 1873 are "local" and "municipal," and that if such a test of validity be accepted, there could be no question that these Acts are to be classified as "municipal or local regulations" within the competence of any municipality to enact, unless expressly prohibited by controlling law. The regulation of service in restaurants and other places of public accommoda-

tion is traditionally regarded as a proper subject of local concern. An anti-discrimination regulation, prohibiting denial of service because of race or color, is no less local than other types of regulation familiarly used by municipalities in the interest of public health, safety, and welfare. Municipal governments throughout the country have exercised authority to enact local ordinances dealing with racial discrimination in public places; and it has never been believed that such laws could be enacted only by state legislatures on a uniform state-wide basis.

The Government respectfully submits, however, with all deference to the judges in the courts below who dealt with the validity issue by attempting to ascertain whether the 1872 and 1873 Acts were "general" or "municipal" in nature, that the issue should not be considered and determined by this Court on that basis. We believe that the distinction between "general legislation" and "municipal regulations" is neither relevant nor useful as a test of the validity of the Acts, which depends solely upon the construction and constitutionality of the Organic Act of 1871.

The *raison d'être* of the distinction between "general" and "municipal" subjects of legislation does not exist in the District of Columbia. The distinction has a respected place in the law of municipal corporations applied in the states. In that context, the considerations upon which

it is based and the use to which it is put by the courts are reasonable and proper. Where the charter of a city empowers it, in general terms, to enact "municipal ordinances or regulations", the question may arise whether a particular enactment falls within the scope of the authority thus delegated. In the absence of express constitutional or statutory provision, state courts generally invoke a canon of construction or rule of presumption that the state legislature is presumed to have reserved to itself the power to enact legislation dealing with matters which are of state-wide concern and call for uniform state-wide treatment by the legislature. Such matters are described as the subjects of "general legislation"; a familiar example is the law of marriage and divorce. On the other hand, matters which may appropriately be dealt with on a local basis by municipalities in accordance with local needs and desires, and as to which there is no necessity for uniform state-wide treatment, are regarded as proper subjects of "municipal ordinances or regulations."

The problem before the state courts in such cases is entirely different from that presented here. There the state courts use the distinction between "general" and "municipal" as an aid to construction, in determining how much authority has been delegated; like other such aids, it yields to a plain manifestation of contrary

legislative intent. It must be emphasized that the distinction is used by the state courts for the purpose of determining what the state *has* delegated, not what it can delegate. It is based, not upon any inherent limitation on municipal power, but solely upon a presumed policy favoring state-wide uniformity of legislation in certain fields—a policy which a state is entirely free to alter as it sees fit. There is no rule of constitutional law which denies a state power to delegate authority to a municipality to enact “general” legislation effective within its own borders. On the contrary, this Court has in many cases held that a legislature may give a municipality “all the powers such a being is capable of receiving, making it a miniature State within its locality.” *Barnes v. District of Columbia*, 91 U. S. 540, 544.

The danger which use of the distinction is intended to avert, namely, that municipalities within a state might each enact different and conflicting laws upon a subject-matter as to which the state deems it desirable that there be a uniform state-wide rule, does not exist in the District of Columbia as it was constituted by the Organic Act of 1871 and as it exists today. In the District the powers of local government are geographically coextensive with the entire area of the territory, and there can be no problem of conflicting laws enacted by different municipalities within the District.

Finally, even in the context of the law of municipal corporations where it evolved and has a proper place, it has been recognized (see opinion of Chief Judge Stephens, R. 79) that the utility of the distinction is impaired by the fact that it is intrinsically vague and indefinite.^{8a} To transplant it to the context of federal constitutional law, in which it can have no proper place, as a yardstick for measuring the extent of the power of Congress to grant legislative authority to the District of Columbia, would serve only to introduce extraneous conceptual difficulties and needless confusion and uncertainty into what is essentially a simple problem. "Too broadly gen-

^{8a} See McQuillin, *Municipal Corporations* (3d ed. 1949), section 4.85, which, after reviewing the cases on this subject, concludes that "there are no well-established rules or principles by which to determine what are municipal and what are state affairs." An illustration is *Adler v. Deegan*, 251 N. Y. 467, upholding the validity of the state's Municipal Dwelling Law as against the contention that it dealt with local affairs reserved for municipal legislation. Separate opinions were written by Cardozo, C. J., and Crane, Pound, Lehman, and O'Brien, JJ., expressing differing views as to where "the line of division between city and State concerns" (opinion of Cardozo, C. J., p. 489) should be drawn. In an earlier case, *Matter of Mayor, etc., of New York (Elm St.)*, 246 N. Y. 72, Chief Judge Cardozo's opinion for the court abandoned hope of obtaining a working definition of the distinction (p. 78): "Futile is the endeavor to mark the principle of division with the precision or binding force of a codifying statute. Any statement attempted will need to be shaded down or enlarged to meet the exigencies of particular instances as hereafter they develop."

eralized conceptions are a constant source of fallacy." *Lorenzo v. Wirth*, 170 Mass. 596, 600 (Holmes, J.).

B

The 1872 and 1873 Acts were neither repealed by the 1901 Code nor "abandoned", as Judge Prettyman suggested (R. 89-100), through non-enforcement.

The 1901 Code did not specifically or expressly repeal these Acts, nor are they inconsistent with or replaced by any provisions of the Code, which was, as its legislative history and terms show, intended only as a partial codification of the laws then applicable in the District. The Code was enacted principally as a codification of the general statutes of the Maryland legislature then in effect in the area of the District ceded by that state, and of acts of Congress applicable solely to the District. It was not intended to replace or repeal existing Acts and ordinances, like the Acts of 1872 and 1873, which would be included within a municipal code. In any event, this is an appropriate case for application of the well-settled rule of construction that, "repeals by implication are not favored" and that the "intention of the legislature to repeal must be clear and manifest." *United States v. Borden Co.*, 308 U. S. 188, 198-199, and cases cited.

Judge Prettyman's alternative ground, that the

1872 and 1873 Acts are not now enforceable because they have been "abandoned" by reason of the long failure to enforce them (R. 90), is clearly without substance. Judge Fahy correctly pointed out in the dissenting opinion (R. 114) that the theory of repeal by abandonment rests upon the premise that the 1872 and 1873 Acts were mere conditions imposed upon licenses by the licensing authority. The Acts themselves demonstrate the error of this premise. In express terms they impose an affirmative legal duty of non-discrimination in service upon owners of restaurants in the District, and make violation of that duty a penal offense punishable by fine. The provision for forfeiture of license for one year was merely an additional civil sanction imposed upon the violator. Moreover, even if the Acts be regarded as only imposing conditions upon licenses, there is no basis for finding in any action or inaction of the District Commissioners in exercising their licensing and enforcement powers an implied purpose to repeal these Acts.

I

THE ACTS OF 1872 AND 1873 WERE VALIDLY ENACTED BY THE LEGISLATIVE ASSEMBLY OF DISTRICT OF COLUMBIA.

A. The language and purpose of Article I, Section 8, clause 17 of the Constitution.

The government of the District of Columbia was specifically provided for by Article I, Section

8, clause 17 of the Constitution, which reads as follows:

The Congress shall have Power * * *
To exercise exclusive Legislation in all
Cases whatsoever, over such District * * *
as may, by Cession of particular States,
and the Acceptance of Congress, become
the Seat of the Government of the United
States * * *.

This Court has frequently noted "the plenary power to legislate for the District of Columbia, conferred by Art. I, § 8, cl. 17 of the Constitution. Under that clause, Congress possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed." *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434-435. See also *Civil Rights Cases*, 109 U. S. 3, 19; *Mattingly v. District of Columbia*, 97 U. S. 687, 690; *Hornbuckle v. Toombs*, 18 Wall. 648, 655; *Stoutenburgh v. Hennick*, 129 U. S. 141, 147. In the last-cited case the Court stated: "Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible" (129 U. S. at 147).

The word "exclusive" in Article I, Section 8, clause 17, does not, as the majority judges in the

Court of Appeals seemed to assume, mean "non-delegable." It was put there solely to make it clear that the law-making authority of Congress should be exclusive and not concurrent with that of the ceding states. See Elliott's *Debates in the Several States on the Adoption of the Federal Constitution* (1854), Vol. III (Virginia), pp. 430-441;° *The Federalist*, No. 43; Story, *Commentaries on the Constitution* (4th ed. 1873), vol. 2, secs. 1216-1223; Crosskey, *Politics and the Constitution in the History of the United States* (1953), vol. 1, pp. 493-494. The Supreme

° Some delegates to the Virginia Convention feared that the grant of "exclusive" legislative power in the district of the seat of government would enable Congress to enact oppressive laws there. James Madison thought there was no basis for such apprehension (Elliott's *Debates, supra*, pp. 432-433):

"* * * I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states. Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether. How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the session and deliberations of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress?"

Court of the District of Columbia, in 1879, correctly observed "that the term 'exclusive' has reference to the States, and simply imports *their* exclusion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to that of Congress and created by it;" *Roach v. Van Riswick*, MacArthur & Mackey 171, 174; and see opinion of Circuit Judge Taft in *Grether v. Wright*, 75 Fed. 742, 756-57 (C. A. 6), quoted

Edmund Pendleton also believed that Congress needed such "exclusive" power (*id.*, pp. 439-441):

"Mr. Chairman, this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large. But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings. Notwithstanding the violent attack upon it, I believe, sir, this is the fair construction of the clause. It gives them power of exclusive legislation in any case within that district. What is the meaning of this? What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures? I understand it as opposed to the legislative power of that state where it shall be. What, then, is the power? It is, that Congress shall exclusively legislate there, in order to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be. This is the fair construction. Can we suppose that, in order to effect these salutary ends, Congress will make it an asylum for villains and the vilest characters from all parts of the world? Will it not degrade their own dignity to make it a sanctuary for villains? I hope that no man that will ever compose that Congress will associate with the most profligate characters."

approvingly in *O'Donoghue v. United States*, 289 U. S. 516, 539. Accord: *Barnes v. District of Columbia*, 91 U. S. 540, 544; *Welch v. Cook*, 97 U. S. 541, 542; *National Bank v. Shoemaker*, 97 U. S. 692, 693; *Stoutenburgh v. Hennick*, 129 U. S. 141, 147; *Binns v. United States*, 194 U. S. 486, 491. These cases are clear authorities that the "exclusive" power of Congress to legislate for the District of Columbia includes the power to establish a subordinate local government for the District with appropriate legislative authority.¹⁰

The framers of the Constitution apparently took it for granted that local self-government would be established for the District of Columbia. Madison wrote in *The Federalist*, No. 43: "a municipal legislature for local purposes, derived

¹⁰ Further support for this construction is to be found in the cases arising under the second part of Article I, Section 8, clause 17. After granting power to Congress to "exercise exclusive Legislation" over the area of the seat of government, the clause empowers Congress "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dockyards, and other needful Buildings; * * *."

It has been held in many cases that the "exclusive" power of Congress under the latter part of the clause does not preclude delegation to the ceding states of authority to exercise appropriate local legislative authority over such ceded areas. See, e. g., *Masca Co. v. Tax Commission*, 302 U. S. 186, 207-208; *Stewart & Co. v. Sadrakula*, 309 U. S. 94, 100-101. Congress has expressly provided that state workmen's compensation laws shall be applicable in such areas, 40 U. S. C. 290, and the constitutionality of this legislation has not been doubted. *Capetola v. Barclay White Co.*, 139 F. 2d 556 (C. A. 3); *Ottinger Bros. v. Clark*, 131 P. 2d 94 (Okla.).

from their own suffrages, will of course be allowed them [the inhabitants of the District].¹¹ And almost immediately upon assuming control over the District, Congress established local governments, with popularly-elected legislative bodies, which continued until 1871.

B. Congressional legislation dealing with the District of Columbia, prior to 1871

The history of Congressional legislation dealing with the District of Columbia, beginning with the Act of July 16, 1790, 1 Stat. 130, in which the District was established as the permanent seat of the government of the United States, leaves no doubt that Congress has consistently recognized its power to delegate local legislative authority to the District. Indeed, until the Commissioner form of government was adopted in the Temporary Organic Act of 1874, 18 Stat. 116, the role of Congress in local government for the District was confined to protection of federal buildings and other property. *Metropolitan Railroad v. District of Columbia*, 138 U. S. 1, 5.

The Act of July 16, 1790, 1 Stat. 130, provided that a "district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, * * * is hereby accepted for the permanent seat of the government of the United States." When the United

¹¹ The context of this statement is quoted in the opinion of Judge Chaggett in the Municipal Court of Appeals (R. 37-38).

States took possession of the District of Columbia in December 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; the laws of Virginia were continued over the former, and the laws of Maryland over the latter. Act of February 27, 1801, 2 Stat. 103.

Within part, but not all, of the area of the county of Washington were the cities of Washington and Georgetown. The latter had been incorporated by the Maryland legislature in 1789, and its status and powers were continued by Congress. Act of February 27, 1801, 2 Stat. 103, 108. In 1802 the city of Washington was incorporated by Congress and endowed with the usual powers of a municipal government. It had a mayor, and its council, elected by the white male residents of the city, was empowered to pass by-laws and ordinances. Act of May 3, 1802, 2 Stat. 195; and see Act of February 24, 1804, 2 Stat. 254.

In 1805 Congress amended the charter of the city of Georgetown to provide for a board of aldermen and a common council, both to be elected by the "free white male citizens" of the city, and having the usual legislative powers of a municipal government. Act of March 3, 1805, 2 Stat. 332. In 1812 the charter of the city of Washington was amended in similar fashion. Act of May 4, 1812, 2 Stat. 721. The county of Wash-

ington was governed by a levy court composed of seven commissioners appointed by the President. Act of July 1, 1812, 2 Stat. 771. The county of Alexandria was re-ceded to Virginia by the Act of July 9, 1846, 9 Stat. 35.

This pattern of local government within the District continued, substantially unchanged, until the Organic Act of February 21, 1871 (16 Stat. 419) abolished the cities of Washington and Georgetown and the county of Washington, and established a single unified government for the entire District of Columbia. See Acts of May 15, 1820, 3 Stat. 583; May 17, 1848, 9 Stat. 223; August 6, 1861, 12 Stat. 320; March 3, 1863, 12 Stat. 799.

C. The Construction and Constitutionality of the Organic Act of 1871

Section 1 of the 1871 Act provided that:

* * * all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

Section 5 vested "legislative power and authority" in a Legislative Assembly, consisting of a Council and a House of Delegates.¹² The Act provided that "the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the provisions of this act * * *." (Section 18.)¹³ The executive authority was vested in a Governor, appointed by the President with the advice and consent of the Senate. (Section 2.) Section 34 provided for an elected delegate to the House of Representatives, having the same rights and privileges as those of delegates from other federal territories.¹⁴

¹² The Act provided that the members of the Council were to be appointed by the President with the advice and consent of the Senate, and that the members of the House of Delegates were to be elected by male citizens of the United States residing in the District.

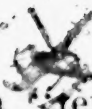
¹³ This comprehensive power was restricted in two respects: (1) the prohibitions upon the powers of the States contained in Article I, Section 10 of the Constitution (*i. e.*, against entering into treaties, granting letters of marque and reprisal, coining money, etc.) were made applicable to the District of Columbia; and (2) Congress reserved the right to repeal or modify all acts of the Legislative Assembly. In addition, the Act withheld from the Legislative Assembly power to legislate on specified matters such as divorce, descent, court procedure, and remission of fines. None of these is relevant to the Acts involved in the present case. 16 Stat. 419, 423.

¹⁴ The ~~form~~ of government was short-lived, ending with enactment of the Temporary Organic Act of June 20, 1874, 18 Stat. 116, which substituted a temporary government of three Commissioners appointed by the President and en-

When Congress in the Organic Act of 1871 thus established a single unified government for "all that part of the territory of the United States included within the limits of the District of Columbia" (16 Stat. 419), the debates on the bill reflected an explicit recognition that it was creating a territorial government for the District patterned on other territorial governments. Cong. Globe, 41st Cong., 3d Sess., 642-644, 686-687, 1264, 1363. And both this Court and the Court of Appeals for the District of Columbia, in referring to the form of government established by the 1871

dowed with limited executive and administrative functions. The Commissioner form of government was placed on a permanent basis by the Organic Act of June 11, 1878, 20 Stat. 102. Referring to the changes made by the 1874 and 1878 Acts, this Court said in *Metropolitan Railroad v. District of Columbia*, 132 U. S. 1, 7: "Legislative powers have now ceased, and the municipal government is confined to mere administration."

The Act of January 26, 1887, 24 Stat. 368, authorized the District Commissioners to make "usual and reasonable police regulations" as to specified subjects, *e. g.*, traffic regulation, taxi fares, street-littering, etc. The Act of February 26, 1892, 27 Stat. 394, extended the Commissioner's authority to embrace "all such reasonable and usual police regulations * * * as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia." The limited scope of the Commissioners' powers, as contrasted with the broad legislative power enjoyed by the Legislative Assembly under the 1871 Act, was emphasized in *Roth v. District of Columbia*, 16 App. D. C. 323, 331; *Coughlin v. District of Columbia*, 25 App. D. C. 251, 254; *United States ex rel. Daly v. MacFarland*, 28 App. D. C. 552.



Act, characterized it as a territorial government." *Eckloff v. District of Columbia*, 135 U. S. 240, 241; *District of Columbia v. Hatton*, 143 U. S. 18, 20; *Roth v. District of Columbia*, 16 App. D. C. 323, 330; and see *Grant v. Cooke*, 7 D. C. 165; 194, 200-201.

As will appear below, the decisions of this Court establish that there is no significant difference; with regard to the power of Congress to delegate local legislative authority, between Article I, Section 8, clause 17, dealing with the District of Columbia, and Article IV, Section 3, clause 2, dealing with the other federal territories. The latter provision reads:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Under both provisions the law-making power of Congress with respect to the District of Columbia and the territories is exclusive, but only in the sense that no state can intrude upon its supreme legislative authority; under neither provision is Congress precluded from creating subordinate bodies endowed with local legislative authority.

The words "all rightful subjects of legislation" in Section 18, defining the scope of the authority delegated to the Legislative Assembly, did not originate in the Organic Act of 1871. Congress

used substantially identical language in defining the legislative powers of the territorial governments established in earlier territorial organic acts; and these provisions in the various acts were codified in Section 1851 of the Revised Statutes (1873-1874) as follows: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." And see 48 U. S. C. 77, 562, 821, and 1405r.

This Court, in construing these provisions, has held that the words "all rightful subjects of legislation" embrace all laws which are local and appropriate to territorial self-government. In *Maynard v. Hill*, 125 U. S. 190, 204, the Court took note of the essential similarity of the provisions in the organic acts defining the legislative powers of the territories, and held that what were "rightful subjects of legislation" was to be determined "by an examination of the subjects upon which

¹² Territorial Organic Acts of: *Louisiana* (March 26, 1804, 2 Stat. 283, 284); *Wisconsin* (April 20, 1836, 5 Stat. 40, 42); *Iowa* (June 12, 1838, 5 Stat. 235, 237); *Oregon* (Aug. 14, 1848, 9 Stat. 323, 325); *Minnesota* (March 3, 1849, 9 Stat. 403, 405); *New Mexico* (Sept. 9, 1850, 9 Stat. 446, 449); *Utah* (Sept. 9, 1850, 9 Stat. 453, 454); *Washington* (March 2, 1853, 10 Stat. 172, 175); *Nebraska and Kansas* (May 30, 1854, 10 Stat. 277, 279, 285); *Colorado* (Feb. 28, 1861, 12 Stat. 172, 174); *Dakota* (March 2, 1861, 12 Stat. 239, 241); *Arizona* (Feb. 24, 1863, 12 Stat. 664, 665); *Idaho* (March 3, 1863, 12 Stat. 808, 810); *Montana* (May 26, 1864, 13 Stat. 85, 88); *Wyoming* (July 25, 1868, 15 Stat. 178, 180).

legislatures had been in the practice of acting with the consent and approval of the people they represented." In *Cope v. Cope*, 137 U. S. 682, 684, the Court, referring to such a provision in the Utah Organic Act, stated that, aside from the exceptions expressly contained in that Act, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State." Accord: *Hornbuckle v. Toombs*, 18 Wall. 648, 655-656.^{15a} And in *Christianson v. King County*, 239 U. S. 356, 365, it was said that " 'Rightful subjects' of legislation * * * included all those subjects upon which legislatures have been accustomed to act." See also *Puerto Rico v. Shell Co.*, 302 U. S. 253, 260-262.

The grant of legislative power to deal with local matters contained in the District of Columbia Organic Act of 1871 and in the other territorial organic acts, is thus "as broad and comprehensive as language could make it." *Puerto Rico v. Shell Co.*, *supra*, at 261. In effect, these acts constitute delegations by Congress to the territorial legis-

^{15a} In *Hornbuckle v. Toombs*, *supra*, the Court stated (pp. 655-656) that the "all rightful subjects of legislation" provisions entrusted the territorial legislatures "with the enactment of the entire system of *municipal* law, subject also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature * * *." (Italics added.) Compare this broad use of the word "municipal" with discussion of *Stutenbach* opinion, pp. ~~34-40~~, *infra*.

latures of all the local legislative power that Congress can constitutionally delegate.^{15b}

The power of Congress to make such delegations is indisputable. *Simms v. Simms*, 175 U. S. 162, 168; *Binns v. United States*, 194 U. S. 486, 491; *Miners' Bank v. Iowa*, 12 How. 1; *Christianson v. King County*, 239 U. S. 356, 365. In the *Simms* case the Court emphasized the breadth of the legislative authority thus delegated (175 U. S. at 168):

In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over

^{15b} When the 1871 Act was debated in Congress, both its proponents and opponents recognized the breadth of the legislative authority delegated. Representative Hoar of Massachusetts, arguing against the bill, stated that it "undertakes to establish in this District an assembly with power to make laws—with powers of legislation. * * * Under it rights of property are to be established; under it offenses are created; under it men may be sent to the penitentiary or to the gallows." (Cong. Globe, 41st Cong., 3d Sess., p. 644.) Representative Woodward of Pennsylvania, who favored the bill, countered that it "makes the District of Columbia a Territory of the Government, and, like other Territories, it will be subject to the paramount legislative power of Congress." (*Ibid.*) Another proponent of the bill, Representative Poland of Vermont, read aloud from *The Federalist*, No. 43 (see pp. 17-20, *supra*) in which, he stated, "it is declared that there is no question but what, under this clause of the Constitution, Congress has the power to delegate legislative power to a local Legislature. And Judge Story, in the third volume of his Commentaries on the Constitution, cites approvingly this declaration of the Federalist. There is therefore very weighty authority in favor of this power." (*Ibid.*, p. 645.)

all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power to the legislative assembly of a Territory.

* * * In the exercise of this power, Congress has enacted that (with certain restrictions not affecting this case) "the legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." * * *

The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a State, are regulated by the laws of the State only. [Italics added.]

This Court and the lower federal courts have consistently sustained the validity of territorial legislation dealing with subjects which, in a state, would ordinarily be dealt with by the state legislature. *Hornbuckle v. Toombs*, 18 Wall. 648 (procedural code limiting forms of action); *Maynard v. Hill*, 125 U. S. 190 (divorce statute); *Cope v. Cope*, 137 U. S. 682 (statute permitting illegitimate children to inherit); *Atchison, T. & S. F. Ry. v. Sowers*, 213 U. S. 55 (statute limiting tort claims); *Christianson v. King County*, 239 U. S. 356 (statute escheating property); *Puerto Rico v. Shell Co.*, 302 U. S. 253 (anti-trust statute); *People of Porto Rico v. American R. R. Co.*, 254 Fed. 369 (C. A. 1) (statute regulating freight

rates); *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209 (C. A. 9) (statute abolishing dower).

It is particularly significant that several territories, acting under grants of legislative authority like that contained in the District of Columbia Organic Act of 1871, have enacted laws prohibiting racial discrimination in places of public accommodation. Alaska Compiled Laws, Section 20-1-3 (1949); Puerto Rico Laws, 1943, Act No. 131, pp. 404-407;¹⁶ Virgin Islands, Act of September 12, 1950, Bill No. 1; 15th Legislative Assembly of Virgin Islands, 1st session.^{16a} The constitutionality of such anti-discrimination legislation under the Fifth and Fourteenth Amendments is, of course, beyond question. *Railway Mail Association v. Cersi*, 326 U. S. 88, 93-94, 98; *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 31, 34; *Western Turf Association v. Greenberg*, 204 U. S. 359; *Rhone v. Loomis*, 74 Minn. 200; *People v. King*, 110 N. Y. 418.

¹⁶ The Puerto Rico statute has been upheld by the Supreme Court of Puerto Rico as a proper exercise of the legislative power granted to the Territory by Congress. *People of Puerto Rico v. Suazo*, 63 Puerto Rico Reports 869.

^{16a} Laws prohibiting discrimination in public employment have been enacted in Hawaii (Revised Laws, 1945, ch. 2, sec. 75 (b); as added by 1951 Series A-2, Act 319, and sec. 123, 1951 Series A-3) and Puerto Rico (Act No. 345, Laws of 1947, secs. 14, 31 (b), 36 (a)); and laws prohibiting discrimination in public educational institutions have been enacted in Alaska (Compiled Laws, 1949, sec. 37-10-24); Hawaii (Revised Laws, 1945, ch. 34, sec. 1941); and Puerto Rico (cf. Constitution, 1952, Art. II, sec. 1; Act No. 135, Laws of 1942, secs. 15, 25).

If Congress sees fit to do so, the Constitution thus permits it to delegate power to the people of a territory to govern themselves and to enact local laws incident to self-government. In the past Congress has pursued the policy of delegating such local legislative power as soon as it found that a territory was ready to assume this responsibility.¹⁷ The Constitution does not prevent Congress from treating the District of Columbia on the same basis. The Court has recognized that whether, and the extent to which, Congress should delegate authority to enact local laws in the territories, including the District of Columbia, is solely a matter of legislative policy (*Binns v. United States*, 194 U. S. 486, 491):

It must be remembered that Congress, in the government of the Territories *as well as of the District of Columbia*, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. * * * *It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.* [Italics added.]

¹⁷ In *Clinton v. Englebrecht*, 13 Wall. 434, 441, the Court noted that the Congressional policy underlying the broad grants of legislative authority to the territories "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority * * *."

D. The distinction between "general" and "municipal" subjects of legislation is inapplicable here

Nothing in the Constitution, or in the decisions of this Court interpreting it, supports the notion that the constitutional power of Congress to delegate local legislative authority to the District of Columbia is limited by a vague and ambiguous^{17a} distinction between "general legislation" and "municipal regulations." That distinction evolved in the law of municipal corporations governing the powers of ordinary municipalities within a state. Even in that context, it does not forbid a state, if it chooses to do so, to delegate to a municipality authority to enact local ordinances dealing with a "general" subject-matter. (*Infra*, pp. 43-46.)

The majority judges of the Court of Appeals held, however, that Congress cannot grant authority to enact "general legislation"; that its delegatory authority is restricted to "municipal regulations and ordinances"; and that "general legislation" includes enactments which "are in the nature of civil rights legislation," or which restrict freedom of contract, use of property, or carrying on a lawful calling. See pp. 5-7, *supra*. This test of delegability, if accepted, would appear to preclude even a grant of authority to enact ordinances dealing with such clearly local

^{17a} See footnote 8a, *supra*.

matters as land zoning, regulation of building construction, public health regulation, etc. All of these limit freedom of contract, use of property, and the exercise of a lawful calling, but it could not be seriously contended that they are for that reason beyond the power of local governments. *Breard v. Alexandria*, 341 U. S. 622, 629-633; *Euclid v. Amber Realty Co.*, 272 U. S. 365, 388-395; *Faitoute Co. v. Asbury Park*, 316 U. S. 502, 509-516; *Railway Express v. New York*, 336 U. S. 106; *Queenside Hills Co. v. Saxl*, 328 U. S. 80, 82-84.

Furthermore, the distinction between "general legislation" and "municipal regulations" has no relevance in defining the power of Congress to delegate legislative authority to the District of Columbia. See Note, 21 Geo. Wash. L. Rev. 337, 348. The distinction derives from the law of municipal corporations applicable to municipalities within a state. In a state, legislation of a municipality may possibly encroach upon powers reserved to the state legislature or interfere with the rights of other municipalities. Some matters, like the law of domestic relations and of wills and inheritance, are usually regarded as of state-wide concern and as calling for uniform state-wide treatment, unless authority to deal with them is expressly delegated to municipalities. In the law of municipal corporations these are described as the subjects of "general legislation." On the other hand, matters which

may appropriately be dealt with on a local basis by a municipality, in the absence of overriding state law to the contrary, are regarded as proper subjects of "municipal regulations." McQuillin, *Municipal Corporations* (3d ed. 1949), secs. 4.85, 15.18-15.19, 15.30, 16.04-16.09, 23.03-23.05; Dillon, *Municipal Corporations* (5th ed. 1911), secs. 537, 630-632.¹⁸

The geographical factors which have led state courts to draw the distinction between "general legislation" and "municipal regulations" do not exist in the District of Columbia. In the District the powers of local government are geographically coextensive with the entire area of the territory. In this crucial respect it is totally unlike the ordinary municipality within a state, and like a territory it combines elements both of a city and state. Congress itself described the District of Columbia, in the Act of July 16, 1790, 1 Stat. 130, establishing the District as the

¹⁸ As has been noted (footnote 13, *supra*), the Organic Act of 1871 expressly withheld from the Legislative Assembly of the District the power to deal with certain specified subjects. Section 17 contained a list of laws which could not be enacted by the Legislative Assembly. Among these were laws for granting divorces; changing the law of descent; and affecting the sale or mortgage of real estate belonging to minors. This enumeration of forbidden subjects of local legislation did not include "civil rights" or "anti-discrimination" laws. By plain implication, these were included within the residual category of "all rightful subjects of legislation" upon which the Assembly was empowered to act.

permanent seat of the government of the United States, as a "district of territory." This Court has said: "The District of Columbia is an exceptional community. It is not a local municipal authority, but was established under the Constitution as the seat of the National Government." *District of Columbia v. Murphy*, 314 U. S. 441, 452. In *Grether v. Wright*, 75 Fed. 742, 757 (C. A. 6), Circuit Judge Taft characterized the District as "the city, not ~~of a~~ a state, not of a district, but of a nation." And, in similar recognition that the District is not comparable to an ordinary city in a state, the Court has said "that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State" to which Congress can grant "subordinate legislative powers of a municipal character * * *". *Metropolitan Railroad v. District of Columbia*, 132 U. S. 1, 9.^{18a}

To be sure; there was a time, prior to 1871, when the District of Columbia comprised more than one municipality (*supra*, pp. 21-22); at that time an analogy to the law of municipal corporations applicable in the states might have been relevant in determining the powers of each such municipality. But there could certainly have been no doubt then that the territory comprising such municipalities, *i. e.*, the entire District of

^{18a} As to the meaning of "municipal" in this context, compare *Hornbuckle v. Toombs*, 18 Wall. 648, 655, quoted in footnote 15a, *infra*, and see discussion, pp. 38-40, *supra*.

Columbia area, was—so far as the power of Congress to delegate legislative authority was concerned—a territory and not an ordinary municipality. See Act of July 16, 1790, 1 Stat. 130. Obviously, the consolidation in 1871 of these municipalities into a single unified government for the District of Columbia did not alter its constitutional status, or diminish the power of Congress in relation to it.

In the District of Columbia, as it was constituted by the Act of 1871 and as it exists today, there can be no problem of conflicting laws enacted by different municipalities within the District.¹⁹ The opinion in *Roach v. Van Riewick, MacArthur & Mackey* 171, which is quoted in the opinion of Chief Judge Stephens (R. 70-71), itself shows that the distinction between “general” and “municipal” legislation which the court applied was based upon the fact, no longer true since 1871, that the District of Columbia was in its inception composed of several municipalities and was not, as now, a single unified government (pp. 178-179):

There might be twenty municipalities in one State. * * * It would never do to

¹⁹ Laws passed by the Legislative Assembly defining “general” crimes have been upheld, *United States v. May*, 2 MacArthur 512 (abortion), notwithstanding that a municipal ordinance of such a nature, if enacted by a city within a state, might possibly be regarded as “general legislation” reserved, unless expressly delegated, as a subject for state-wide legislation.

have different rules of property, different laws of contract generally, or of commercial paper in particular, different legal proceedings and remedies, and different criminal codes in the different municipalities of a State. It is very plain that the disposition of these subjects by law is the exercise of legislative power, and that, when that is constitutionally vested in a definite legislative body, it cannot, in the nature of things, be delegated to another. The power of making laws derived directly from the people is legislative; the power of local regulation derived from the legislature is municipal, no matter how limited or extensive the locality embraced by it.

These conclusions will apply to the Congress of the United States, even if we regard it as a mere local legislature, in its relations with the District of Columbia. When it assumed jurisdiction over the District, it found two corporations, Alexandria and Georgetown, in existence, and a few years later it created a third, the city of Washington. Each one of those corporations had a charter, and all the charters differed more or less in detail, while the general features of municipal charters were common to all. It would have been preposterous for Congress to have committed to each the power of regulating or ordaining legal proceedings and remedies, establishing the law of contracts, &c., within their respective corporate limits. Three or four different systems of law

would have prevailed, the creatures of municipal action; and great confusion and perhaps conflict would have prevailed.^{19a}

Relying upon the *Roach* case, *inter alia*, the majority judges in the court below, without examining the considerations which differentiate the District of Columbia from an ordinary municipality within a state, and which make inapplicable the distinction between "general legislation" and "municipal regulations," assumed its applicability as a constitutional limitation on the powers of Congress in relation to the District of Columbia. The case in this Court upon which they principally relied is *Stoutenburgh v. Henrich*, 129 U. S. 141. But that case held only that the Legislative Assembly had no power to enact a law restricting commerce with persons outside the District, and that the regulation of interstate commerce rested within the exclusive power of Congress.

True, the Court's opinion in the *Stoutenburgh* case stated that Congress "could only authorize it [the District of Columbia] to exercise munic-

^{19a} The *Roach* opinion also stated (p. 176) that "municipal regulation * * * is universally recognized as something distinct from the exercise of legislation, which is invested by the Constitution of a state in its legislature, and cannot be delegated." But this Court has, in cases too numerous for citation, repeatedly held that a municipal ordinance is as much an exercise of legislative power as a state law. See e. g., *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 148, and cases cited.

ipal powers * * *” (p. 147). There is no reason to assume, however, that the word “municipal,” as used by Mr. Chief Justice Fuller in that opinion written in 1889, was necessarily used in the narrow, restricted sense which the judges below attributed to it. The word “municipal” was frequently used, particularly by jurists and text-writers in the last century, in the broad sense of “internal” or “domestic,” as distinguished from “foreign” or “international.”²⁰ Moreover, the preceding paragraph of the *Stoutenburgh* opinion leaves no doubt as to what was meant by “municipal powers”:

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities

²⁰ Webster gives, as a common meaning of the word, “pertaining to the internal or governmental affairs of a state, kingdom, or nation” (*International Dictionary*, 2d ed. 1948, p. 1611). The Oxford English Dictionary’s first definition is “Pertaining to the internal affairs of a state as distinguished from its foreign relations. Originally and still chiefly in the phrase *municipal law*, the law of a particular state, as distinguished from international law or the law of nations. So *municipal rights, jurisdiction, etc.*” Its second definition is “Pertaining to the local self-government or corporate government of a city or town. In common use only from the 19th c.” (Murray ed. 1908, vol. 6, p. 767.)

“Municipal law” was used in such a broad sense in *Hornbuckle v. Toombs*, 18 Wall. 648, 655 (1874), quoted in foot-

exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

In its context, therefore, the statement that "general affairs" shall be managed "by the central authority" means simply that national matters, such as regulating interstate commerce, declaring war, raising armies, establishing uniform rules of naturalization, etc., are to be dealt with by Congress on a national basis, and not by a local legislature in the District on a local basis. The Court, in the same sentence, reiterated the "cardinal principle of our system of government,

note 15a, *supra*. In *City of New York v. Miln*, 11 Pet. 102, 139 (1837), the Court referred to "all those powers [of a state] which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police* * * *." See also *United States v. Cruikshank*, 92 U. S. 542, 553 (1875).

Compare *Chicago & Pac. Ry. Co. v. McGlinn*, 114 U. S. 542, 546 (1885). " * * * municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign." The *McGlinn* case held a statute of Kansas imposing liability on railroads for the destruction of cattle to be "of a municipal character." See also *Steele v. Halligan*, 229 Fed. 1011, 1018 (W. D. Wash. 1916): " * * * the municipal law of the old sovereignty [referring to a state] regulating civil rights * * *."

that local affairs shall be managed by local authorities * * *." It neither stated nor implied that there existed a class of "local affairs of a general nature" which could not constitutionally be delegated to local authorities.

Metropolitan Railroad v. District of Columbia, 132 U. S. 1, the only other decision of this Court cited in Chief Judge Stephens' opinion, held only that under the Act of June 11, 1878 (20 Stat. 102), the District of Columbia had a right to bring suit in its own name. That right was expressly granted by the 1871 Organic Act, and the Court construed the 1878 Act as also giving the District such right. Apart from the fact that it is only remotely related to the problem here involved, that case dealt with the District of Columbia as constituted under the Organic Act of 1878 (see footnote 14, *supra*).

None of the decisions of the lower District of Columbia courts cited in the opinions below, apart from *Roach v. Van Riswick*, *supra*, furnishes support for the asserted restriction on the power of Congress to delegate local legislative authority. *Coughlin v. District of Columbia*, 25 App. D. C. 251, and *United States ex rel. Daly v. MacFarland*, 28 App. D. C. 552, dealt respectively with an ordinance of the District Commissioners requiring property owners to remove snow from the streets and with the power of the Commissioners to impose the penalty of forfeiture of a license. Both involved definition of the scope of the nar-

row executive and administrative powers of the Commissioners under the form of government established in 1878. The Commissioners' powers are, of course, primarily executive and administrative, not at all comparable to the legislative powers granted to the Legislative Assembly under the 1871 Act. (See footnote 14, *supra*.) In the *Coughlin* case the court stressed that ^{the} authority of the Commissioners under the Acts of 1887 and 1892 was limited to promulgation of "reasonable and usual police regulations." Under these Acts, the court stated (p. 254), "it is regulation, not legislation, that is authorized; * * *. The commissioners are not the municipality, but only the executive organs of it; and Congress has reserved to itself, not only the power of legislation in the strict sense of the term * * *, but even the power of enacting municipal ordinances, such as are within the ordinary scope of the authority of incorporated municipalities."

District of Columbia v. Saville, 1 MacArthur 581, which held invalid an act of the Legislative Assembly regulating sales of theatre tickets, and *Smith v. Olcott*, 19 App. D. C. 61, which held invalid an act of the same body regulating the fees of auctioneers, were plainly based on the view that such regulations were outside the scope of the police power—that is, that they would be invalid even if enacted by Congress or by a state legislature. This restricted view of the police power has been discredited since *Nebbia v. New*

York, 291 U. S. 502, and *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. *United States v. Cella*, 37 App. D. C. 433, dealt only with the question whether a prosecution for violation of an act of Congress prohibiting "bucket shops" could be brought in the name of the District of Columbia under the statute providing for District prosecution for violation of ordinances in the nature of police or municipal regulations (see footnote 42, *infra*).

E. The Acts of 1872 and 1873 would be valid even if enacted by a municipality within a state, having only ordinary municipal powers

This Court has held in many cases (*supra*, p. 17) that Congress in dealing with the District of Columbia has all the powers possessed by a state in dealing with one of its municipalities. A state unquestionably can delegate authority to a municipality to enact local legislation designed to solve problems arising from racial discrimination. The extent to which a state can delegate its powers to a municipal government is a matter for its own determination; the state has "unrestrained power * * * over political subdivisions of its own creation." *Faitoute Co. v. Asbury Park*, 316 U. S. 502, 510; *Hunter v. Pittsburgh*, 207 U. S. 161, 178-179; *Barnes v. District of Columbia*, 91 U. S. 540, 544; *Schiefelin v. Hylan*, 236 N. Y. 254, 260-261; *Milwaukee v. Raulf*, 164 Wis. 172, 183; *Duluth v. Cer-*

veny, 218 Minn. 511, 515. In the *Barnes* case this Court said (p. 544): "A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality." Accord: *Metropolitan Railroad v. District of Columbia*, 132 U. S. 1, 8.^{20a}

^{20a} The constitutions of many states contain provisions for "home rule" of larger cities, and under such provisions the laws of the cities prevail over state laws, with respect to local matters. *Adler v. Deegan*, 251 N. Y. 467; *Dickinson v. Tidd*, 137 F.2d 610, 612 (C. A. 10); McQuillin, *Municipal Corporations* (3d ed. 1949), secs. 4.83, 15.30. The provisions of the constitution of the State of New York (1938) are typical. Article 9, Section 11, provides: "The legislature may by general laws confer on cities such powers of local legislation and administration * * * as it may, from time to time, deem expedient and may withdraw such powers." Article 9, Section 12, provides: "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs, or government. Every city shall also have the power to adopt and amend local laws not inconsistent with the constitution and laws of the state, and whether or not such local laws relate to its property, affairs, or government, in respect to the following subjects: * * * the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health." Pursuant to these provisions the New York legislature has enacted a "City Home Rule Law" (McKinney's Consolidated Laws, Book 7-A). In *People v. Lewis*, 295 N. Y. 42, 49, it was held that these constitutional and statutory provisions gave New York City "broad legislative power to provide by local law for the preservation and promotion of the health, safety and general welfare of its inhabitants," and hence a local price and rent control law, not inconsistent with state or federal law, was valid.

Except as limited by state constitutional or statutory prohibitions, express or implied, the delegated power of municipalities to enact regulatory ordinances is as broad as the police power of a state. *City of Phoenix v. Michael*, 61 Ariz. 238, 243; *Shepherd v. McElwee*, 304 Ky. 695, 698; *People v. Sell*, 310 Mich. 305, 315; *Schultz v. State*, 112 Md. 211, 215-218; McQuillin, *Municipal Corporations* (3d ed. 1949), secs. 16.04-16.09. The constitutionality of anti-discrimination legislation, as a proper exercise of the police power, is settled. *Railway Mail Association v. Corsi*, 326 U. S. 88, 93-94, 98; *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 31, 34; *Western Turf Association v. Greenberg*, 204 U. S. 359; *Rhone v. Loomis*, 74 Minn. 200; *People v. King*, 110 N. Y. 418. And, as is shown below (pp. 47-51, *infra*), municipal governments throughout the country, acting within the orbit of authority delegated by their states, have enacted ordinances dealing with racial discrimination in public places. It would be strange indeed if Congress, which has been held to have "complete sovereignty" over the District (*S. R. A., Inc. v. Minnesota*, 327 U. S. 558, 562, and see other cases cited *supra*, p. 17), were denied a power to delegate local legislative authority which is so commonly exercised by the states.

However, even if, contrary to our argument as to the breadth of the power constitutionally

delegated by Congress to the District of Columbia by the Organic Act of 1871, the latter Act should be narrowly construed as granting the Legislative Assembly only the ordinary, conventional powers of a municipal corporation within a state, the Acts of 1872 and 1873 would still be valid. This argument formed the principal basis of Judge Fahy's dissenting opinion in the Court of Appeals, and it would serve no useful purpose to repeat here in detail the wealth of supporting authorities collected in that opinion.

The regulation of service in restaurants and other places of public accommodation is traditionally regarded as a proper subject of local concern. See, *e. g.*, *Cooper v. District of Columbia*, MacArthur & Mackey 250, 259, 260. If a municipality can regulate a restaurant's sanitary conditions, in the interest of the public health; if it can regulate the construction of its building, its seating arrangements, and the number of its patrons, in the interest of the public safety; then surely it can regulate or prohibit, in the interest of the public welfare, any discrimination in service on account of race or color. An anti-discrimination regulation is not essentially different from these other types of regulation. All of them affect the rights and duties of a restaurant owner; all limit his freedom of contract and his use of property. In each case, however, only local regulation is involved. Cf. *Euclid v. Amber Realty Co.*, 272

U. S. 365, 388-395; *Breard v. Alexandria*, 341 U. S. 622, 629-633; *Kovacs v. Cooper*, 336 U. S. 77, 83 (opinion of Reed, J.); *Railway Express v. New York*, 336 U. S. 106; *Queenside Hills Co. v. Saxl*, 328 U. S. 80, 82-84.

Moreover, as is abundantly demonstrated in the dissenting opinion of Judge Fahy, municipal governments throughout the country have exercised the power to enact ordinances dealing with racial discrimination in public places. Many of these prohibit racial segregation; others require segregation.

Many local ordinances prohibit racial and religious discrimination in employment;²¹ in pub-

²¹ *Arizona*: Phoenix Ordinance No. 4810, April 27, 1948; *California*: Richmond, Ordinance No. 1303, May 16, 1949; *Iowa*: Sioux City, Ordinance No. Q-34826, February 23, 1951, published March 6, 1951; *Illinois*: Chicago, August 21, 1945; *Indiana*: East Chicago, Ordinance No. 2526, March 12, 1951; Gary, Section 25, Chapter 18 (Municipal Code), November 20, 1950; *Michigan*: River Rouge, November 4, 1952; Pontiac, Ordinance No. 1196, November 18, 1952; *Minnesota*: Minneapolis, January 31, 1947, effective February 5, 1947, amended October 29, 1948, May 25, 1951; *Ohio*: Akron, April 10, 1951; Campbell, October 19, 1950; Cincinnati, Ordinance No. 196-1946, June 5, 1946; Cleveland, Ordinance No. 1579-48, January 30, 1950; Girard, Ordinance No. 2031, September 25, 1951; Hubbard, December 1950; Lorain, Ordinance No. 6495, October 2, 1951; Lowellville, March 14, 1951; Niles, Ordinance No. 7014, May 17, 1951; Steubenville, Ordinance No. 7856, April 16, 1951; Struthers, October 5, 1950; Warren, Ordinance No. 4018-51, February 19, 1951; Youngstown, Ordinance No. 51948, May 16, 1950; *Pennsylvania*: Farrell, 1951; Monessen, Ordinance No. 345, December 13, 1950; Philadelphia, Journal of City of Philadelphia, App. III, pp.

lie housing;²² and in places of public accommodation.²³ There are also many local ordinances

179-185, March 12, 1948; Pittsburgh, Ordinance No. 465, December 1, 1952; Sharon, May 8, 1951; *Wisconsin*: Milwaukee, Ordinance No. 22, Secs. 106-24 *et seq.*, Milwaukee Code, May 13, 1946.

²² *California*: Los Angeles, Ordinance No. 97536, January 12, 1951; Los Angeles, Resolution of Bd. of Supervisors, Los Angeles County, July 3, 1951; San Francisco, Resolution No. 8660 of Bd. of Supervisors, May 17, 1949; *Connecticut*: Hartford, Resolution of Court of Common Council, January 24, 1949; *Massachusetts*: Boston, Resolution, City Council, June 28, 1948; *Michigan*: Pontiac, Resolution, Public Housing, Pontiac Housing Commission, No. 76, November 19, 1951; *Minnesota*: St. Paul, Resolution, Public Housing Redevelopment Authority, April 1950; *Nebraska*: Omaha, Resolution, Omaha Housing Authority, November 9, 1951; *New Jersey*: Newark, Resolution, Newark Housing Authority, September 14, 1950; *New York*: New York, Ordinance No. 20, Title J, Article A, July 3, 1944; New York, Adm. Code of N. Y. C., Sec. 384-16.0, December 23, 1949; New York, N. Y. C. Local Law No. 41, March 14, 1951; *North Carolina*: Charlotte, January 1950; *Ohio*: Cincinnati, Declaration of Urban Redevelopment Policy, City Council, September 5, 1951; Cleveland, Ordinance No. 2139-49, December 21, 1949; Toledo, Resolution, Public Housing Metropolitan Housing Authority, December 4, 1952; Toledo, Ordinance, Public Housing, City Council No. 738-51, November 14, 1951; *Pennsylvania*: Allegheny County, Resolution, Public Housing Allegheny County Housing Authority, December 30, 1952; Philadelphia, Resolution, Public Housing, Philadelphia Housing Authority, No. 3630, May 26, 1952; Pittsburgh, Resolution, Public Housing, Housing Authority of City of Pittsburgh, December 18, 1952; *Rhode Island*: Providence, Resolution, City Council, No. 724, October 10, 1950; *Washington*: Pasco, Resolution No. 114, Pub. Housing Authority, May 24, 1951.

²³ *Florida*: Miami Beach, Ordinance No. 883, June 15, 1949; Surfside, Ordinance No. 190, April 9, 1950; *California*: Bakersfield, February 14, 1950; Los Angeles, Ordinance No.

which establish commissions working for improvement of inter-racial relations.²⁴ The significance of this widespread practice is, as Judge Fahy pointed out, persuasive in determining the validity of such regulation in a field in which "there is no rule of thumb by which to determine whether a regulation is local or constitutes general legislation beyond municipal competence" (R. 105).²⁵

No less persuasive is the prevalence of ordinances requiring segregation, for these, apart from the question of their validity under the

77000, Art. 6, Ch. 4, Sec. 46.01, February 14, 1950; *New Mexico*: Albuquerque, Ordinance No. 768, February 12, 1952; *Ohio*: Cleveland, Ordinance No. 101-637; Sec. 2999-1 Municipal Code of Cleveland, November 26, 1934, Ordinance No. 223-46, February 17, 1947..

²⁴ *California*: Los Angeles, January 11, 1944; *Colorado*: Denver, Ordinance No. 11, January 31, 1951; *Illinois*: Chicago, December 12, 1947; *Indiana*: Evansville, March 2, 1948; Indianapolis, Ordinance No. 9, February 16, 1953; Fort Wayne, July 22, 1952; *Michigan*: Detroit, April 7, 1953; Jackson, Ordinance No. 211, November 9, 1948; *Missouri*: Kansas City, November 14, 1951; St. Louis, January 13, 1950; *New Jersey*: Paterson, 1949; *New York*: Buffalo, Ch. 96 of 1945 Ordinances, August 1, 1945; *Ohio*: Akron, September 8, 1949; Cincinnati, November 17, 1943; Cleveland, Ordinance No. 240-15, adding Secs. 71-1 to 71-4 to the Municipal Code of 1924, March 13, 1945; Toledo, Ordinance No. 229-46, July 6, 1946; *Oregon*: Portland, Ordinance No. 91286, March 9, 1950; *Pennsylvania*: Pittsburgh, December 17, 1946.

²⁵ But cf. *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773. This case, however, held no more than that the legislature had not, as a matter of construction, delegated to the city power to enact an anti-discrimination law.

Fifth and Fourteenth Amendments,²⁶ have frequently been upheld by the courts of many states as valid municipal regulations.²⁷ These ordinances, moreover, pertain specifically to a variety of public accommodations, including restaurants.²⁸ Chief Judge Stephens' opinion sought to distinguish such cases on the ground that the ordinances there sustained "were in accord with a local custom of racial segregation on account of color and were held valid upon the theory that they were for the purpose of preserving peace and

²⁶ As the Court is aware, it is the position of the United States that racial segregation enforced or supported by law is unconstitutional. See briefs for the United States in the "school segregation" cases now pending before the Court (Nos. 8, 101, 191, 413, 448) and in *Henderson v. United States*, 339 U. S. 816; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637.

²⁷ See e. g., *Boyer v. Garrett*, 183 F. 2d 582 (C. A. 4); *Patterson v. Taylor*, 51 Fla. 275, 40 So. 493; *Croom v. Schad*, 51 Fla. 168, 40 So. 497; *Mayo v. James*, 53 Va. 17; *Hopkins v. City of Richmond*, 117 Va. 692, 86 S. E. 139; *Roberts v. Boston*, 5 Cush. 198 (Mass.); *Housing Authority v. Higginbotham*, 143 S. W. 2d 95 (Tex. Civ. App.); *Bunn v. City of Atlanta*, 67 Ga. App. 147, 19 S. E. 2d 553.

²⁸ A. In places of public accommodation: *Alabama*: Birmingham, Secs. 369, 597, 859, 959, 1110, and 1111, General City Code (1944); *Georgia*: Atlanta, Secs. 37-129, 43-302, 53-603-606, 66-1005, 68-126, 55-217, Code (1942).

B. Transportation: *Alabama*: Birmingham, Secs. 1002, 1413, General City Code (1944) Mobile, Chap. 20, Art. 1, Secs. 224-230, Code of Ordinances, May 6, 1947; *Florida*: Jacksonville, Ordinance No. T-215, approved March 4, 1929; *Georgia*: Atlanta, Secs. 62-121, 85-138, Code (1942); *Texas*: Dallas, Arts. 76-22, 77-14, 136-1 *et seq.*, Dallas City Code (1941); Houston, Secs. 2207-2216, City Code (1942).

good order which would likely be interfered with by racial association." On the other hand, he stated, the "enactments involved in the instant case were in conflict with local custom in respect of race association and cannot therefore be justified as in aid of the preservation of peace and order" (R. 83). We think that the attempted distinction fails, for several reasons.

First, the constitutional power of a municipality to enact a law does not depend upon whether or not the legislation accords with local custom. We agree with Judge Fahy that "there is no doctrine known to the law that validity or invalidity of legislation rests upon whether or not it conforms with prevailing custom" (R. 108). Chief Judge Stephens assumed it to be a fact, so clear that a court could take judicial notice of it, that "there was general discrimination on account of color at the time the enactments in question in the instant case were passed" (R. 81). We question the validity of this assumption. Evidently the custom was not so widespread as to make the electorate unwilling to vote for a legislature which enacted the 1872 and 1873 laws. The assumption overlooks, moreover, the well-known civil rights sentiment prevalent in many quarters during the Reconstruction period. The District of Columbia points out in its brief here that, in the decade preceding enactment of these laws by the Legislative Assembly, Congress abol-

ished slavery in the District of Columbia (Act of April 16, 1862, 12 Stat. 376); granted Negroes the right to vote in any election in the District (Act of January 8, 1867, 14 Stat. 375); made Negroes amenable to the same laws as white persons (Act of May 21, 1862, 12 Stat. 407); gave Negroes the right to ride on street cars in the District (Act of March 3, 1865, 13 Stat. 536); and proposed the Thirteenth, Fourteenth, and Fifteenth Amendments. Moreover, the council of the city of Washington enacted ordinances in 1869 and 1870 which made it unlawful for proprietors of restaurants, theatres, and other specified establishments to refuse service to any orderly person because of his race or color. (See R. 84, footnote, and R. 105-107.)

The validity of an ordinance as a proper exercise of municipal authority does not depend on a showing that its purpose and effect are to preserve peace and order. From time immemorial local governments have had to make laws dealing with all matters of community concern, including health, safety, education, and welfare. Cf *Eyclid v. Amber Realty Co.*, 272 U. S. 365, 388-395. Preservation of peace and order is a proper, but not the exclusive, concern of a municipality.²⁹

²⁹ McQuillin, *Municipal Corporations* (3d ed. 1949) § 24.198, summarizes the proper subjects of municipal regulation as follows: "Such [municipal] regulation constitutes a proper exercise of the police power where it is reasonably related to the promotion or protection of the public morals

But even if the rule were otherwise, we think that a legislative judgment that an anti-discrimination ordinance tends to alleviate inter-racial tension and to reduce the threat of violence is rational and should be respected by the courts in passing upon the validity of an exercise of municipal power. Obviously, the fact that certain non-law-abiding elements might resort to violence in resisting a measure they disapprove cannot establish its invalidity as beyond the limits of municipal power. If Chief Judge Stephens' opinion means that the validity of an ordinance depends upon whether it is in accord with "local custom" as judicially noticed by a court, it would follow that the more pervasive and noxious a local evil is, the less would be the power of a municipality to deal with it: "a municipal law

and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health, or otherwise to the advancement of the public welfare and interest." (The last clause is omitted from the quotation at R. 81.) Summarizing the countless cases on this subject, McQuillin states (§ 24.13) that "courts accord a wide discretion to municipal authorities in the exercise of police power. They have sustained its exercise for purposes more or less indefinite, e. g., the promotion of the 'general interest,' 'general prosperity,' 'general well-being,' 'public welfare' and 'public convenience' of the community, apart from any question of public health, safety or morals." And see cases cited *supra*, pp. 44-45, holding that municipal police power is as broad as the state's.

would be invalid if a court finds it in conflict with "local custom," no matter how deplorable such custom is and how strongly the community desires to alter it.

II

THE ACTS OF 1872 AND 1873 HAVE NOT BEEN REPEALED

In the court below, the four judges who concurred in the opinion of Chief Judge Stephens held, as an alternative ground of decision, that the 1872 and 1873 Acts, being "general legislation", were repealed by Congress when it enacted the District of Columbia Code of 1901 (31 Stat. 1189). Judge Prettyman agreed that if the 1872 and 1873 Acts were "general", they were repealed by the 1901 Code. He expressed the further view, in which only Judge Miller joined (R. 100), that if the Acts were "regulatory municipal ordinances," they were within the power of the present District Commissioners to repeal and hence were abandoned and impliedly repealed by the long failure of the Commissioners to enforce them.

We think that neither of these grounds relied on in the court below as establishing repeal of the Acts has merit. It should be noted, at the outset, that in the Organic Act of 1878 (20 Stat. 102), establishing the present Commissioner form of government, Congress expressly provided that

"all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect." Congress thereby, in effect, ratified the Acts of 1872 and 1873 enacted by the Legislative Assembly, and gave them as much status and force as if they had been enacted by Congress itself.

A. *The 1901 Code*

Section 1636 of the 1901 Code is set out in the footnote.³⁰

³⁰ "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:

"First. Acts and parts of acts relating to the rights, powers, duties, or obligations of the United States.

"Second. Acts and parts of acts relating to the Court of Claims.

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

"Fourth. Acts and parts of acts relating to the militia.

"Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

"Sixth. Acts and parts of acts of Congress relating solely to the Departments of the General Government in the District of Columbia, or any of them.

The section has two parts, the first a general repealer clause, and the second, comprising a list of eight groups of exceptions and the last paragraph, a saving and reenacting provision. If a

“Seventh. Acts or parts of acts authorizing, defining, and prescribing the organization, powers, duties, fees, and emoluments of the register of wills of the District of Columbia and his office.

“Eighth. An act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

“All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code.” /

statute falls within the first part of the section, it is repealed unless it comes within one of the saving exceptions. In the court below it seems to have been assumed that the 1872 and 1873 Acts came within the first part of Section 1636. The disagreement related primarily to whether the Acts fell within one of the saving provisions of Section 1636, or within Section 1640, set out below.

Our position is different. We reject any assumption that the 1872 and 1873 Acts were covered by the general repealer clause of Section 1636. The origin, history, purpose, and terms of the Code abundantly demonstrate that it was never intended to repeal enactments of the Legislative Assembly, like the 1872 and 1873 Acts, which were appropriate for inclusion in Part II of the original draft of the Code—the part which was not enacted by Congress. It is pertinent in this connection to emphasize the settled rule of construction that “repeals by implication are not favored” and that the “intention of the legislature to repeal must be clear and manifest.” *United States v. Borden Co.*, 308 U. S. 188, 198–199, and cases there cited.

Even if the court below was correct, however, in assuming that the Acts were covered by the general repealer clause of Section 1636, we think it erred in holding that they were not saved by the second part of that section. We believe that

these Acts fall within the third and fifth exceptions, which saved acts of the Legislative Assembly relating to "police regulations" or "to municipal affairs," or were "penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." Finally, we urge that the Acts are embraced within the separate saving provision of Section 1640, which reads:

Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of * * * any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

The reasons for our views lie, initially, in the genesis and purposes of the Code.

*1. History and Scope of the Code*³¹

a. The 1901 Code, as enacted by Congress, originated in a draft code prepared over a period of years by Judge Walter S. Cox, an Associate Justice of the Supreme Court of the District of Columbia. Judge Cox acted in response to a joint request by the Washington Board of Trade and

³¹ The historical material contained in this portion of the brief was largely obtained from the following sources: H. Rep. No. 1017, 56th Cong., 1st Sess., pp. 4-6; Cox, *Code of Law for the District of Columbia* (1898) pp. vii-xiv; Historical Introduction, District of Columbia Code (1951 ed.) pp. ix-xiv, as well as other sources specifically cited.

the District bar association. See 5 Repts. Wash. Bd. of Tr. 16 (1895); 8 *id.* 22-26 (1898). The bar and the Board of Trade were moved by dissatisfaction with the scattered sources of statutory and judge-made law in the District of Columbia, in which there were recognized at least five separate sources of law:

(1) The common law and principles of equity. In respect to the District of Columbia the particular application of the common law had to be found in and formulated from the common law of England (including equitable principles) as it was received by the courts of Maryland, to the extent that it was not "locally inapplicable," and from the decisions of the Maryland courts until 1801. The basis for their application to the District was the Organic Act of 1801 (2 Stat. 103), which provided "that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted * * * ³²

(2) British statutes enacted before 1787, if not "locally inapplicable." These were incorporated partly because of the widely accepted principle that such British acts, up to an indeterminate

³² A parallel provision applied Virginia law to that part of the District known as Alexandria County, west of the Potomac River, which was ceded by Virginia. This portion was retroceded to Virginia by the Act of July 9, 1846, 9 Stat. 55. (See pp. 23, *supra*.)

time between the settlement of the colonies and the Declaration of Independence became part of the common law and partly because some such acts applied as colonial statutes in the colony of Maryland and remained in force there after 1776.

(3) Acts of the General Assembly of Maryland before 1801. These also applied by virtue of the Organic Act of 1801.

(4) Acts of Congress applicable solely to the District, and those of a general nature not locally inapplicable in the District.

(5) Acts of the Legislative Assembly of the District of Columbia enacted during the three years of its existence.

When the Board of Trade and the bar association asked Judge Cox to draft a code, there was no single legislatively-enacted official compilation or codification of these scattered and sometimes obscure sources, although a number of unsuccessful attempts to obtain one had been made over many years.³³ Judge Cox undertook a com-

³³ The only official codification was the Revised Statutes of the District of Columbia, which contained all Acts of Congress expressly applicable to the District. Act of June 20, 1874, c. 333, 18 Stat. 113. The unsuccessful attempts to secure enactment of compilations or codifications of all applicable statute law are listed and described in the Historical Introduction to the District of Columbia Code (1951 ed), pp. ix-x, as follows:

“1. Code of Laws for the District of Columbia: prepared under the authority of the Act of Congress of the 29th of

plete revision and modernization of the statutory law of the District. His original purpose was to replace all the existing statute law by a new code in which he "treated every subject provided for by it, except such matters as were of a transitory

April, 1816. Preface signed by W. Cranch, November 19, 1818. Washington 1819, 575 pages.

"This code was obviously designed for enactment by Congress, but no official action was taken with respect to it. It is drawn from old British statutes and acts of Maryland and Virginia, as well as from acts of Congress relating to the District of Columbia; it apparently includes all subjects of legislation except provisions relating to the municipal government of Washington, etc.

"2. The Acts of Congress, in relation to the District of Columbia, 1790-1831, and of the Legislatures of Virginia and Maryland, passed especially in regard to that District. By William A. Davis. Washington City, 1831, 375 pages.

"This is merely an unofficial compilation of separate acts, with no attempt at arrangement by subject.

"3. The Revised Code of the District of Columbia, prepared under the authority of the Act of Congress * * * approved March 3, 1855. Preface signed by Robt. Ould and Wm. B. B. Cross, November, 1857. Washington, 1857, 699 pages.

"The act of March 3, 1855 (10 Stat. 642-643), provided for a vote by the people of the District of Columbia as to the adoption of the code as published. The vote was adverse, according to Wilhelmus Bogart Bryan, in his History of the National Capital (v. 2, p. 439).

"4. An Analytical Digest of the Laws of the District of Columbia. By M. Thompson. Washington City, 1863. 454 pages.

"This digest is entirely unofficial. It aims to give all the law in force, with a few annotations. It is not clear whether the laws have been copied verbatim, or the substance given in other words. Provisions relating to municipal government of Washington, etc., are not included.

character and such as may be called obsolete."

Cox, *Code* (1898) p. vii; see H. Rep. No. 1017, 56th Cong., 1st Sess. 4. For source material Judge Cox relied largely on Abert & Lovejoy's *Compiled Statutes* (listed as as No. 8 in footnote

5. *Compilation of the Laws in Force in the District of Columbia*, April 1, 1868. Washington, Government Printing Office, 1868, 494 pages.

"This compilation contains no preface or explanation of its scope. It gives the text of the laws, arranged by subjects. Provisions relating to the municipal government of Washington, etc., are not at all completely included.

6. *Statutes in force in the District of Columbia*. Washington, 1872. 639 pages. House Miscellaneous Document No. 25—42d Congress, 3d session.

"This compilation was prepared under the direction of the Legislative Assembly of the District of Columbia. While purporting to be a compilation only, it includes many innovations. It was transmitted by the Governor of the District of Columbia to the House of Representatives, but was never adopted.

7. *Revised Statutes of the United States relating to the District of Columbia*. Washington, 1875, 201 pages.

"This revision was enacted by Congress and approved June 22, 1874. It covers all subjects of Federal legislation relating to the District, except local (i e., portions of the District only) and private matters.

8. *The Compiled Statutes in force in the District of Columbia*, including the Acts of * * * 1887-'89. Compiled by William Stone Abert and Benjamin G. Lovejoy. Washington, Government Printing Office, 1894, 730 pages.

"This compilation, prepared pursuant to the act of March 2, 1889 (25 Stat. 872, ch. 392), includes acts of Congress, of Maryland, of Great Britain, and of the District of Columbia legislative assembly, with a few annotations. It covers all subjects of legislation except local and private matters. This compilation is wholly unofficial, in that the completed work never received legislative sanction."

33, above). He used the Maryland, Virginia, Ohio, and New York Codes as models. He refrained from any attempt to codify the common law. *Ibid.*

Contemplating introduction of this proposed comprehensive code in Congress, Judge Cox drafted an enacting clause which contained a standard repeal provision "that all laws and parts of laws inconsistent herewith be, and they are hereby, repealed" (Cox, *Code* (1898) p. 1). However, apart from this express repealer, it is plain from the comprehensive scope of the Code and the manifest intention of the draftsman to replace *all* existing statutes particularly applicable in the District that all such statutes would have been repealed by necessary implication, had Congress adopted the Code as originally drafted. Cf. *Hamilton v. Rathbone*, 175 U. S. 414, 420. Repealed with them, whether or not replaced by equivalent provisions in the new Code, would have been the 1872 and 1873 Acts.

b. But the Cox code was not submitted to Congress, nor enacted by it, in the form in which it was originally drafted. Judge Cox had divided the code into two parts. The first part contained 61 chapters dealing with various groups of subject matter not easily classifiable under a single head. Among them were chapters relating to the judiciary, probate, adoption, conveyancing, corporations, crimes, divorce, the statute of frauds, wills,

rules of procedure, and numerous others.³⁴ Judge Cox subsumed them under a single head on the

³⁴ The complete list of chapter headings under Part I reads as follows:

Chapter

1. The Judiciary
2. Abatement
3. Absence for Seven Years
4. Account
5. Actions
6. Administration
7. Adoption of Children
8. Aliens
9. Amendments
10. Apprentices
11. Arbitration and Award
12. Assignment of Choses in Action
13. Assignment of Insolvent Debtors
14. Attachments
15. Bonds and Undertakings
16. Condemnation of Land for Public Use
17. Constables
18. Conveyancing
19. Corporations
20. Creditors' Suits
21. Crimes and Punishments
22. Descents
23. Divorce
24. Ejectment
25. Estates
26. Evidence
27. Execution
28. Exemptions
29. Fees of Officers and Others
30. Frauds, Statute of
31. Fraudulent Conveyances and Assignments

Chapter

32. Guardian and Ward
33. Habeas Corpus
34. Husband and Wife
35. Interest and Usury
36. Joint Contracts
37. Joinder of Parties and Causes of Action
38. Judgment and Decrees
39. Landlord and Tenant
40. Liens
41. Limitation of Actions
42. Mandamus
43. Marriage
44. Name, Change of
45. Negligence Causing Death
46. Negotiable Instruments
47. Partners
48. Payment of Money Into Court
49. Pleadings and Practice in Relation Thereto
50. Practice, Rules of
51. Process
52. Quo Warranto
53. Replevin
54. Set-off
55. Sureties
56. Tender
57. Third Party Procedure
58. Uses and Trusts
59. Warehousemen
60. Waste
61. Wills

basis that they were "of immediate interest to our profession and litigants." Cox, *Code* (1898) p. viii. The second part of the draft code was captioned: "The Organization and Administration of the Municipal Government of the District of Columbia." It contained some 44 chapters, which dealt either with the internal organization, financing, or administration of the municipal government or with miscellaneous local regulatory and penal provisions enforceable by the municipal government, essentially similar to the 1872 and 1873 Acts here involved.³⁵

³⁵ The complete list of chapter headings under Part II is as follows:

Chapter	Chapter
1. The Commissioners	15. Gas
2. Anatomical Science, Promotion of	16. Harbor Regulations
3. Avenues, Streets and Alleys	17. Health Officer
4. Barbed Wire Fences	18. Highway Extension
5. Board of Children's Guardians	19. Jail
6. Cemeteries and Disposal of Bodies	20. Licenses
7. Commissioners of Deeds and Notary Public	21. Medical and Dental Colleges
8. Dentistry, Practice of	22. Medicine and Surgery
9. Dogs	23. Metropolitan Police
10. Drainage of Lots	24. Militia
11. Female Help in Stores	25. Milk, Regulating Sale of
12. Fire Department and Safety From Fire	26. Oleomargarine
13. Flour, Inspection of	27. Pawnbrokers
14. Game and Fish	28. Pharmacy
	29. Physicians, Testimony of
	30. Plumbing and Gasfitting
	31. Prisoners in the Jail and Workhouse

Before its introduction in Congress, Judge Cox's draft was reviewed by special committees of the Board of Trade and the Bar Association and by other interested persons. 9 Rep. Wash. Bd. of Trade 20-21, 134 (Nov. 1899); 10 *id.* 5-7, 138-142 (Nov. 1900). The special committee of the Board of Trade reported as follows (10 *id.* at 139):

* * * it was found impossible, in the time at command, to thoroughly review the second or *municipal part of Judge Cox's code*. So that the code as submitted to Congress contained only the first or *general part of the code touching matters of general jurisprudence*. It is very important that Congress should take action looking to a proper revision of the second or municipal part of the code, but any action on the part of the Bar must be deferred until a suitable commission can be appointed by Congress to undertake that work: [Italics supplied.]

(See also H. Rep. No. 1017, 56th Cong., 1st Sess., p. 5.)

Chapter

- 32. Public Schools
- 33. Recorder of Deeds
- 34. Reform School for Boys
- 35. Refuse, Disposal of
- 36. Snow, Removal of
- 37. Steam Engineering and
Boiler Inspection
- 38. Street Parking

Chapter

- 39. Subdivision of Land in
County
- 40. Surveyor
- 41. Taxes, Collection of
- 42. Washington Humane So-
ciety
- 43. Water
- 44. Weights and Measures

In accordance with this decision, only the first of the two parts of the original Cox code was included in the bill which was introduced in the 55th Congress. S. 5530, 55th Cong., 3d Sess. This bill contained a new repeal clause, Section 1662, which read as follows:

SEC. 1662. *All English statutes and parts of statutes general and permanent in their nature, all like acts and parts of acts of the general assembly of the State of Maryland, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia, in force in said District on the day of the passage of this Act, are hereby repealed, except acts relating to the municipal affairs of the District of Columbia not covered by this code, such as acts relating to the organization and powers of the Board of Commissioners of said District; the health officer of said District, his powers and duties; the Metropolitan police; the fire department; the collection of taxes; the Board of Children's Guardians; the Reform School for Boys; the Reform School for Girls; the Washington Humane Society; highway extension; avenues, streets, and alleys; street parking; licenses; medicine and surgery; pharmacy; medical and dental colleges; practice of dentistry; promotion of anatomical science; militia; public schools; water supply and*

water rates; weights and measures; harbor regulations; barbed-wire fences; dogs; drainage of lots; female help in stores; game and fish; inspection of flour; steam engineering and boiler inspection; inspector of buildings; plumbing and gas fitting; gas; electric lighting; privies; removal of snow, and disposal of garbage and other refuse; *Provided*, That the incorporation into this code of any general and permanent provision taken from an Act making appropriations, or from an Act containing other provisions of a private or temporary character, shall not repeal nor in any way affect any appropriation or any provision of a private or temporary character contained in any of said acts, but the same shall remain in force. [Italics added.]

Like Section 1636 in its final form, this repeal clause is divisible into two parts. The first, up to the word "except," constitutes the general repeal provision, and the second, after the word "except," contains a list of exceptions to be saved from repeal. In the light of the prior history of the Cox code, the reason for the division is clearly evident. The general repeal provision was obviously an attempt to encompass in broad terms the repeal of all laws which were replaced by Part I of the Cox draft. It sought to describe such laws as acts "general and permanent in their nature," which were probably as satisfactory as

any other adjectives which might have been used. The large bulk of the provisions contained in Part I was derived from acts of the Maryland legislature which were generally applicable throughout that state.³⁶ The saying part of the

³⁶ The subject-matter of Part I of the Cox draft code (see footnote 34, *supra*) bears a striking similarity to that of the then-existing Maryland code, which Judge Cox used as a model. The chapter headings of the Maryland Code of Public General Laws (Poe ed., 1888) are as follows:

Article	Article
1. Rules of Interpretation	20. Constables
2. Agents and Factors	21. Conveyancing
3. Aliens	22. Coroners
4. Almshouses and Trustees of the Poor	23. Corporations
5. Appeals and Error	24. Costs
6. Apprentices	25. County Commissioners
7. Arbitration and Award	26. Courts
8. Assignment of Choses in Action	27. Crimes and Punishments
9. Attachments	28. Crows
10. Attorneys at Law and Attorneys in Fact	29. Currency
11. Banks	30. Deaf, Dumb and Blind— Education of
12. Bastardy and Fornica- tion	31. Debt—Public
13. Bills of Exchange and Promissory Notes	32. Dentistry
14. Bills of Lading, Storage and Elevator Receipts	33. Elections
15. Bounding Lands	34. Estrays—Vessels Adrift—Drift Logs
16. Chancery	35. Evidence
17. Clerks of Courts	36. Fees of Officers
18. Commissioners to Take Acknowledgments	37. Ferries
19. Comptroller	38. Fines and Forfeitures
	39. Fish and Fisheries
	40. General Assembly
	41. Governor
	42. Habeas Corpus
	43. Health

section, excepting from repeal "acts relating to the municipal affairs of the District of Columbia not covered by this code" was due to recognition of the incomplete state of the code, and

Footnote 36—(Continued)

Article	Article
44. Hospital—Maryland	75. Pleadings, Practice and Process at Law
45. Husband and Wife	76. Publication of Laws
46. Inheritance	77. Public Education
47. Insolvents	78. Public Printer
48. Inspections	79. Releases and Receipts
49. Interest and Usury	80. Reporter—State
50. Joint Obligations and Joint Tenancy	81. Revenue and Taxes
51. Juries	82. Riots
52. Justices of the Peace	83. Sales and Notices
53. Landlord and Tenant	84. Seamen
54. Land Office	85. Secretary of State
55. Librarian—State	86. Sheep and Dogs
56. Licenses	87. Sheriffs
57. Limitation of Actions	88. Slander of Females
58. Live Stock	89. Statistics and Information as to Branches of Industry
59. Lunatics and Insane	90. Sureties
60. Mandamus	91. Surveyor
61. Manures and Fertilizers	92. Terrapins — Diamond Back
62. Marriages	93. Testamentary Law
63. Mechanics' Lien	94. Time—Standard
64. Merger	95. Treasurer
65. Militia	96. United States
66. Mortgages	97. Weights and Measures
67. Negligence Causing Death	98. Wharves and State Wharfinger
68. Notaries Public	99. Wild Fowl—Birds and Game
69. Officers	100. Work—Hours of, in Factories
70. Official Oaths	
71. Ordinary and Inn Keepers and Retailers	
72. Oysters	
73. Partnerships—Limited	
74. Pilots	

was undoubtedly intended to save all acts not meant by Judge Cox to be replaced by Part I of his draft—that is to say, all acts which he regarded of such a nature as properly to be dealt with (either incorporated, replaced by something else, or omitted) in Part II of his original draft. The clause goes on to list specifically a number of examples of subjects to be saved, each of which was included within the subjects covered by Judge Cox under Part II of his original draft.

The Code did not pass in the 55th Congress, but it was reintroduced in the 56th, and passed with only minor changes. See H. Rep. No. 1017, 56th Cong., 1st Sess. The repeal provision became Section 1636; and, in order to avoid the necessity of a long list of exceptions corresponding with the chapter headings of Part II of the Cox code, an attempt was made to comprehend the subject matter of the saving provision in a shorter grouping. Eight groups of exceptions were specified, six of which, excluding the third and the fifth, related solely to acts of Congress. The fifth, penal statutes authorizing punishment by imprisonment for less than a year, or by fine, and the third, was broad enough to include at least some acts of the Legislative Assembly. And the correspondence between the “except” clause and Part II of the original Cox draft is sharply emphasized by the parallel between the language of the third exception of Section 1636 and the title to Part II of Judge Cox’s code. The latter

speaks of "the organization and administration of the municipal government"; the former speaks of "acts relating to the organization of the District government * * * and generally all acts and parts of acts relating to municipal affairs only * * *."

2. *Effect of Sections 1636 and 1640 on the 1872 and 1873 Acts*

a. Consideration of this legislative history leads to several conclusions concerning the effect of the enactment of the 1901 Code on the 1872 and 1873 Acts. The Code was plainly not intended to replace the entire then existing body of statutory law.³⁷ It constituted only a partial code and, under settled principles, repealed only those acts which were specifically repealed or which by necessary implication were either inconsistent

³⁷ After enactment of the 1901 Code, its incomplete nature was generally recognized, and unsuccessful efforts were made to codify the parts contained in the original Cox draft but omitted from the law as enacted. The Board of Trade stated in a report in 1902 that the Code was only a "partial codification of suitable laws to govern this District" and the "citizenry continued to seek further enactment and codification of all laws relating primarily to this District." 12 Rep. Wash. Bd. of Trade 23 (Nov. 1902). The Special Legal (Codification) Committee of the Board of Trade urged in 1903 (13 Rep. Wash. Bd. of Trade 119 (Nov. 1903)):

"It will be recollected that the District Code, as originally prepared by Mr. Justice Cox, contained a municipal as well as a general Code. For various reasons, the efforts of the Bar Association Committee, and of this Committee have been, up to the present time, confined to the procuring of the enactment of the present Code. This would seem to be a proper time for taking up the neglected municipal portion.

with or replaced by some provision contained in it. Cf. *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 72; *United States v. Claflin*, 97 U. S. 546.

This history also shows that the effect of Section 1636 was no broader than this. Section 1636 achieves no result that would not have occurred by operation of law without express provision. Nothing in its terms suggests an intention to affect a wider class of laws than was reached by the necessary implication of enacting inconsistent or substitute provisions.³⁸ The close parallel between the bifurcation of the original Cox code and the division of Section 1636 into a repealing clause and a contravening saving clause

The public necessity for such a code is greater today than ever."

For several years the Washington Board of Trade and others continued to urge the enactment of a municipal code. 14 Rep. Wash. Bd. of Trade 7, 28 (Nov. 1904); 15 *id.* 35 (Nov. 1905); 17 *id.* 43, 149 (Nov. 1907); 19 *id.* 34, 117 (Nov. 1909); 20 *id.* 39 (Nov. 1910). In 1908, Senator Gallinger introduced S. Res. 97 in the 60th Congress "to create a Commission to prepare a Municipal Code for the District of Columbia," but the bill died in committee. 42 Cong. Rec. 7017; 18 Rep. Wash. Bd. of Trade 39, 163 (Nov. 1908).'

³⁸ In answer to the suggestion that the provision should not be construed as mere surplusage, it may be pointed out that the inclusion of similar clauses repealing "inconsistent prior acts" is a common practice in drafting statutes, even though such clauses are frequently unnecessary to accomplish repeal. The purpose of such clauses is, by making explicit what would otherwise be implicit, to avoid litigation-breeding doubts and uncertainty. See 1 Sutherland, *Statutory Construction* (3d ed. 1943) § 2013, and cases cited.

demonstrates that the intention of Congress was to reach only those acts affected by some provision of that part of Judge Cox's code which was finally adopted.³⁹

The language of Section 1636 conforms completely with this purpose. It repeals "acts of" the Maryland legislature "general and permanent in their nature" and "like Acts" of the Legislative Assembly of the District of Columbia. "Like Acts" in this context can mean only "general and permanent" acts. "General and permanent" in this provision has, we think, two meanings. Primarily it serves to distinguish statutes included in the code from statutes private, special, or temporary, which were not included in either part of the Cox code. Judge Cox avoided codification of private laws and such temporary enactments as appropriation measures, and Congress followed suit. The intention to avoid repeal of private acts and temporary acts, including especially appropriations, is directly expressed in the proviso clause of Section 1662 of S. 5530, 55th Congress, the repeal section

³⁹ Further evidence that the repeal provisions of the Code were meant as a precise parallel to the subjects treated by Part I of the Cox code is to be found in Sections 1 and 1640, both of which saved from repeal the common law, British statutes in force in Maryland in 1801, and the principles of equity and admiralty—all of which Judge Cox deliberately refrained from including within his Part I. All of these reflect Judge Cox's intention to refrain from codifying the common law. See H. Rep. No. 1017, 56th Cong., 1st Sess., p. 4.

of the bill which was the predecessor of the code (see p. 67, *supra*)⁴⁰ and was contained in Section 1637 of the Code as finally enacted.

Secondly, the terms "general and permanent" are probably as closely descriptive of the class of subject matter in Part I of the Cox code, and hence in the entire 1901 Code, as any brief categorization could be. Examination of the detailed contents of Part I of the Cox code suggests that the term "general" was used in the sense that most of the provisions of that Part relate to matters which the state legislature of Maryland had treated on a state-wide basis. Compare footnotes 34 and 36, *supra*. And the only acts of the Legislative Assembly which could be regarded as "general and permanent in their nature" would be those which dealt with similar subjects, appropriate for inclusion in Part I of the original Cox code.⁴¹

In the concrete context of the history and purpose of the Code, therefore, the Acts of 1872 and

⁴⁰ The Legislative Assembly had enacted a number of private laws. See, e. g., Act of June 25, 1873, Ch. XVIII, For the Relief of John Newton Berryman; Acts of January 19, 1872, Ch. XIX, XX, For the Relief of Joseph Schwartz and Sarah C. Grantum. It also enacted numerous appropriations.

⁴¹ An example of a "general and permanent" act of the Legislative Assembly repealed by the 1901 Code is the Act of August 23, 1871, ch. CII, amending the Statute of Frauds. Sections 1116-1119 of the Code cover that subject. 31 Stat. 1189, 1367-1368.

1873 were not within the class of "general and permanent" laws repealed by the general repealer clause of Section 1636, however those adjectives might be interpreted abstractly and *in vacuo*. No provision in the 1901 Code, as enacted, is so clearly inconsistent with or so clearly intended to substitute for the 1872 and 1873 Acts as to require the conclusion that they were repealed, by implication—repeals which cannot rest on equivocal or ambiguous provisions but only on a "clear and manifest" expression of legislative purpose. See *United States v. Borden Co.*, 308 U. S. 188, 198-199, and cases cited.

No provision of the 1901 Code deals with civil rights, racial discrimination, segregation, or regulation of restaurants and similar establishments. Hence there can be no inconsistency nor any suggestion of a substitute provision, replacing the 1872 and 1873 Acts. The Code does contain a chapter dealing with crimes, but the fifth exception to Section 1636 covers "All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." And it is settled that at least some penal acts of the Legislative Assembly, not codified in the Crimes chapter of the code, survive the enactment of the Code. *Johnson v. District of Columbia*, 30 App. D. C. 520.

On the other hand, there are strong reasons for the conclusion that the 1872 and 1873 Acts fell

not only outside the body of "general" legislation replaced by the Code but within the body of laws saved by the failure to enact the second or "municipal affairs" part of Judge Cox's code. Judge Cox's Part II, like his Part I, contained no provision codifying or directly replacing these Acts. However, we emphasize that even if this negative fact were all the evidence available, the presumption against repeal would require the conclusion that the Acts were not repealed by the general repealer clause of Section 1636.

b. In any event, the Acts of 1872 and 1873 were specifically saved from repeal by the exception clauses contained in Section 1636 (particularly the third and fifth exceptions) and by Section 1640.

These Acts are intrinsically indistinguishable from the class of laws specifically dealt with by Part II of Judge Cox's original draft code. Such laws are expressly saved from repeal by the third exception of Section 1636, saying "acts * * * relating to * * * police regulations, and * * * municipal affairs only." This exception, as we have shown *supra*, p. 63 *et seq.*, is as broad in coverage as the "municipal affairs" part of the original Cox code. And it clearly comprehends the Acts of 1872 and 1873. Both are "police regulations" in the sense of the Code—

exercises of the municipal police power"—and both are, for the reasons we have suggested, acts "pertaining to municipal affairs."

Like many of the acts pertaining to "municipal affairs" specifically contained in Part II of the Cox draft, the 1872 and 1873 Acts are in the nature of penal regulations based upon a governmental exercise of the police power. See, *e. g.*, Cox, *Code* (1898) Part II, ch. 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 25, 26, 27, 28, 30, 35, 36, 37, 38. (See footnote 35, *supra*.) We need not repeat here the arguments and materials contained in the dissenting opinion of Judge Fahy in the court below (R. 102-110) which support the conclusion that these Acts are "local" and "municipal." (And see pp. 46-54, *supra*.) The Acts are enforceable by the municipal government. They are local in scope, affecting only persons and

² See, especially, *Johnson v. District of Columbia*, 30 App. D. C. 520, upholding a conviction under a cruelty-to-animals statute enacted by the Legislative Assembly in 1871. The Court of Appeals for the District of Columbia held that that statute, which does not essentially differ from the 1872 and 1873 Acts here involved, was saved from repeal by the "police regulations" exception of the 1901 Code. And cf. *United States v. Cella*, 37 App. D. C. 433, holding that a prosecution under the federal "bucket shop" statute, 35 Stat. 670, was properly brought in the name of the United States, since the statute was not a local "police or municipal regulation" which had to be enforced in the name of the District, under Section 932 of the 1901 Code (31 Stat. 1189, 1340). The court defined (p. 435) a "municipal ordinance or police regulation" as "peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character."

establishments within the District. They relate to conditions existing chiefly within urban areas. And their subject-matter is of a kind which is widely dealt with, and in variously different ways, by cities. These resemblances between the Acts in question and the acts covered by the omitted part of the Cox code bring these Acts far outside the ambit of the repeal provisions of the 1901 Code.⁴³

For very similar reasons, if express saving language be necessary, the provisions of Section 1640 of the Code, saving from repeal "any municipal

⁴³ For examples of acts which pertain to municipal affairs and which are not police regulations, see, *e. g.*, Cox, *Code* (1898) Part II, Ch. 1, 2, 3, 5, 7, 23, 24, 33. The respondent points out that the eighth saving provision of Section 1636 expressly saved from repeal a list of statutes pertaining, with one exception, to the regulation of various aspects of pharmacy, medicine and hospitals. It argues that if the "police regulations," or the "municipal affairs" exception of the third saving provision were broad enough to comprehend such regulatory legislation, the specific enumeration of the statutes listed in the eighth clause would be unnecessary. But we see no inconsistency in specifically enumerating the acts listed in the eighth exception, even though the general language of the third exception might be broad enough to include them. All the acts listed in the eighth exception were acts of Congress, as are all the acts listed in the First, Second, Fourth, Sixth, and Seventh exceptions. All except one of them dealt with regulated subjects of interest to the medical profession, a well-organized group of the community which would have preferred that the question of repeal *vel non* of such laws should not be left in any possible doubt. For these reasons, it seems likely that the specific enumeration of these acts was dictated not by a belief that they were not covered by other general language but merely by an excess of caution.

ordinance" also covers the Acts of 1872 and 1873. Section 1640, like the second part of Section 1636, expresses the clear intention of Congress to refrain from touching, by its enactment of the Code, anything comprehended by the "municipal affairs" part of the Cox draft, or anything not plainly replaced by the Code.

It is noteworthy that at least one compiler of District statutes subsequent to enactment of the 1901 Code regarded the 1872 and 1873 Acts as still in effect. See Meyers, *Comprehensive General Index of the Laws of the District of Columbia in force January 1, 1912*. And evidence that the 1872 and 1873 Acts were contemporaneously regarded as "police regulations" and "pertaining to municipal affairs" is to be found in a proposed codification of statutes in force in the District, transmitted to Congress by the Governor of the District of Columbia in 1872. The 1872 Act was included as Chapter XI under "Title XII—Of the Internal Police and Municipal Regulations." H. Misc. Doc. No. 25, 42nd Cong., 3rd Sess., pp. 190, 219.

Finally, these Acts are clearly embraced within the fifth exception to Section 1636, which reads:

Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

The Acts of 1872 and 1873 are included within this exception, unless excluded because of the

provision for forfeiture of licenses for one year. But that provision is not a "punishment" in the criminal sense; it is an additional civil sanction imposed upon offenders. *Federal Communications Commission v. WOKO*, 329 U. S. 223, 228; *Ex parte Wall*, 107 U. S. 265, 288; *Hawker v. New York*, 170 U. S. 189, 199-200; *L. P. Steuart & Bro. v. Bowles*, 140 F. 2d 703 (C. A. D. C.), affirmed, 322 U. S. 398; *Nichols & Co. v. Secretary of Agriculture*, 131 F. 2d 651, 659 (C. A. 1); *Board of Trade of City of Chicago v. Wallace*, 67 F. 2d 402, 407 (C. A. 7); *Wright v. Securities and Exchange Commission*, 112 F. 2d 89, 94 (C. A. 2).

B. The acts were not repealed by non-enforcement

Judge Prettyman's concurring opinion in the court below expressed the view that the 1872 and 1873 Acts have been "abandoned" and are now unenforceable. The argument is that the Acts must be regarded as conditions imposed on the licenses of restaurants, and hence that the Commissioners' action in issuing licenses for many years without insisting upon such conditions was tantamount to abandonment or implied repeal of the Acts.

This argument is wholly unfounded. It is based upon a misconception of the nature of the Acts and of the powers of the Commissioners. The premise that the 1872 and 1873 Acts were

mere conditions, imposed by an administrative licensing authority, on the licenses of restaurants in the District is refuted by the express terms of the Acts. The further assumption that the licensing authority of the present Commissioners includes the power to revoke sanctions imposed on licensees by Acts of the Legislative Assembly does not take into account the Congressionally imposed limitations upon the powers of the Commissioners. Moreover, the Commissioners have never taken any action which purported to effect a repeal of these Acts. The short of the matter is that Judge Prettyman, while disavowing such a purpose, was in effect applying a doctrine, for which he conceded that there is no authority whatever, of implied repeal of legislation by non-enforcement.

1. It has long been recognized that mere failure of the executive or administrative agency charged with the enforcement of a penal or other statute to prosecute violations of it cannot repeal the statute. The power to repeal legislation resides in the legislature, and no other branch of the government can exercise it, either expressly or by any implication arising from its inaction. "A failure to enforce the law does not change it." *Louisville & N. R. R. v. United States*, 282 U. S. 740, 759; and see *United States v. Morton Salt Co.*, 338 U. S. 632, 647-648; *Kelly v. Washington*, 302 U. S. 1, 14; *Chicago, B. & Q. R. R.*

v. *Iowa*, 94 U. S. 155, 162; *Costello v. Palmer*, 20 App. D. C. 210, 220."

2. Judge Prettyman recognized this rule. He sought to avoid its consequences, however, by arguing that the result should be otherwise because the provisions of the 1872 and 1873 Acts amounted to conditions upon the licenses granted to restaurants. On their face, however, the Acts are penal legislation and not conditions on the grant of the privilege of doing business. They do not provide for the issuance of licenses, nor do they prescribe terms for licenses. Their provisions apply to existing businesses, already

" See also *Standard Oil Co. v. Fitzgerald*, 86 F. 2d 799 (C. A. 6); *McKeown v. State*, 197 Ark. 454, 124 S. W. 2d 19; *Parker v. Board of Dental Examiners*, 216 Cal. 285, 14 P. 2d 67; *State v. Burr*, 79 Fla. 290, 84 So. 61; *Shutt v. State ex rel. Cain*, 173 Ind. 689, 89 N. E. 6; *State v. Mellor*, 140 Md. 364, 117 Atl. 875; *Naughton v. Boyle*, 129 Misc. 867, 223 N. Y. Supp. 432; *Beers v. Hotchkiss*, 135 Misc. 796, 238 N. Y. Supp. 463; *State v. Nease*, 46 Ore. 433, 80 Pac. 897; *Nashville, C. & St. L. Ry. v. Baker*, 167 Tenn. 470, 71 S. W. 2d 678; *Gulf Refining Co. v. Dallas*, 10 S. W. 2d 151 (Tex. Civ. App.)

Judge Prettyman cited, but refrained from relying upon, dicta in a few early cases suggesting that long non-user of a statute which has become "obsolete" might make it unenforceable. See, e. g., *Wright v. Crane*, 13 S. & R. 447, 452 (Pa.); *Porter's Appeals*, 30 Pa. St. 496, 499; *Snowden v. Snowden*, 1 Bland. 550, 555 (Md. Ch.). But the cited opinions go no further than to suggest a possible doctrine of repeal of obsolete statutes by non-user. In each case the unenforced statute was held to be still in effect. We know of no case where a statute was held to have become unenforceable merely because of "obsolescence" or "non-user." *District of Columbia v. Robinson*, 30 App. D. C. 283, contained language looking toward "obsolescence" of a colonial Sunday

licensed, as well as to businesses thereafter to be licensed.

The mere fact that the Acts apply to businesses which are subject to licensing requirements does not make them conditions of the licenses. Wage and hour legislation, child labor legislation, and many other kinds of regulatory acts also apply to licensed businesses, but it could not be suggested that such legislation is meant only as a condition to the issuance of a license by an administrative licensing authority. These laws are purely regulatory.

law of Maryland. But the case amounts only to a holding that the law, in so far as it was based on religious premises, constituted an establishment of religion, and in so far as it was supportable as a secular exercise of the police power, had been repealed by subsequent comprehensive legislation. Among the other cases cited by Judge Prattiman, *Hill v. Smith*, Morris 70, 76-79 (Iowa Terr.) was clearly based upon repeal of the statute in question by subsequent inconsistent acts of Congress, and the Supreme Court of Iowa, as Judge Fahy points out, has since rejected the doctrine of repeal by non-user (see *Pearson v. International Distillery*, 72 Iowa 348, 357, 34 N. W. 1, 5-6); and *James v. Commonwealth*, 12 S. & R. 220 (Pa.) involved only a common law punishment.

Moreover, the scattered dicta in the few early cases cited almost all referred to situations where the statutes involved were truly obsolete, in the sense that their purposes no longer had vitality or significance in serving the needs of any substantial portion of the community. The contrary situation exists in this case. At the very least, it may be said that the 1872 and 1873 Acts serve ends which are as much alive for a substantial part of the community as they were when enacted.

It is true that one of the sanctions provided for violation of the Acts is forfeiture of the offender's license, but the statutory imposition of this sanction does not mean that the penal provisions were intended as terms of the license. Cf. *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419, 442. The Acts do not require compliance with their terms as a prerequisite to the issuance of a license.

3. Moreover, it is by no means clear, even if the Acts could correctly be called conditions upon the licenses of restaurants, that so to label them would require the conclusion that they have been revoked by any action of the present licensing authority. Clearly, the Commissioners have not purported expressly to revoke or repeal the Acts by any regulations of their own. Nor have they enacted regulations covering the subject of race discrimination or segregation in restaurants. (See the detailed discussion of this point in Judge Fahy's dissenting opinion, R. 114-117.) The respondent points to no terms of any license issued by the Commissioners imposing duties inconsistent with their duties under the Acts. Any repeal must be by implication of some inaction on the part of the Commissioners.

Repeals by implication are never favored, and we think that this rule is as applicable in weighing the effect of a course of conduct by an executive or administrative body as in considering the

meaning of a statute claimed to repeal an earlier act. This is especially true where, as here, there is a serious question of the power of the agency to effect a repeal. The question in this case is not merely one of a licensing body's revoking regulations or conditions formerly imposed by it, or even by a predecessor licensing authority. It is a question of the power of the present licensing body to revoke laws enacted by a former body having entirely different powers and functions.

Moreover, as has been shown, these Acts of the Legislative Assembly were in effect reenacted by Congress in the Organic Act of 1878, and, if not repealed by the 1901 Code, continued in force since that date to the same extent as if they had originally been enacted by Congress (*supra*, p. 55). Surely it could not be suggested that the Commissioners were authorized, by any action or inaction, to repeal statutes of Congress. But, even if these Acts had only the status of laws of the Legislative Assembly validly enacted under authority delegated by Congress, we think it would still be true that the Commissioners did not repeal these Acts.

The powers of the Commissioners under the present form of government are far more limited than those of the Legislative Assembly under the Organic Act of 1871. (See footnote 14, *supra*.) The Legislative Assembly was vested with "legislative power and authority" (Section 5) with-

held from the Commissioners, whose functions are largely administrative and executive. See *District of Columbia v. Bailey*, 171 U. S. 161, 176; *Roth v. District of Columbia*, 16 App. D. C. 323; *Coughlin v. District of Columbia*, 25 App. D. C. 251, 254; *United States ex rel. Daly v. MacFarland*, 28 App. D. C. 552; *Dennison v. Gavin*, 3 MacA. 265 (D. C.). Even on the assumption that the Commissioners had power to revoke license conditions fixed by the Legislative Assembly, the failure of the Corporation Counsel to institute prosecutions under the Acts which might have resulted in convictions requiring the Commissioners to initiate license revocation proceedings, cannot reasonably be treated as equivalent to deliberate actions of the Commissioners implying an intention to repeal the Acts.⁴⁵

CONCLUSION

For the reasons stated, it is respectfully submitted that the Acts of 1872 and 1873 are valid and still in full force and effect. The judgment of the Court of Appeals should be reversed with

⁴⁵ In any event, as Judge Fahy pointed out, if the Commissioners could repeal statutory license conditions on an *ad hoc* basis, they could revive them the same way (R. 119): "To repeal a regulation is to make a regulation, and whoever can do the one can do the other. The abandonment argument in the end destroys itself in so far as this case is concerned, for if these regulations can be placed out of operation by non-use on the part of District officials they can be put back into operation by use on the part of the same officials."

directions that the case be remanded to the Municipal Court for trial.⁴⁶

HERBERT BROWNELL, Jr.,
Attorney General.

ROBERT L. STERN,
Acting Solicitor General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

T. S. L. PERLMAN,
Attorney.

APRIL 1953.

⁴⁶ The information on which this case is based was brought in four counts. The first count alleged violation of the Act of 1872; the remaining three counts were based on the 1873 Act. The respondent contended in the court below that the 1872 Act was entirely superseded by the 1873 Act. In the view taken by the majority in the court below, that both Acts were repealed, the court below did not pass upon this contention.

The omission from the 1873 Act of some businesses regulated by the 1872 Act constitutes no inconsistency suggesting repeal of the 1872 Act in its entirety. Rather, it suggests the preservation of each Act, in so far as each applies to different businesses. On the other hand, it seems unlikely that the Legislative Assembly intended to double the penalties on restaurants, which are named in both Acts, while leaving them unchanged with respect to some of the other establishments. It would follow, if the two Acts are to be construed harmoniously, that only the later statute should apply to violations by restaurants.

Neither the court below nor the Municipal Court of Appeals passed on the question of the effect of the 1873 Act upon the 1872 Act, and we do not think that this Court should do so. On remand to the Municipal Court for trial, it will be open in that court for the Corporation Counsel to drop the first count, based on the 1872 Act, if he so chooses. In any event, even if the first count should remain in the case, this question of "double penalties" would not arise unless respondent were convicted on all four counts and a separate, cumulative sentence were imposed as to each count.

APPENDIX

1. The pertinent provisions of the Constitution of the United States read as follows:

Article I, Section 8, Clause 17:

The Congress shall have Power * * *
To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings * * *.

* * * * *

Article IV, Section 3, Clause 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. The pertinent provisions of the Organic Act of 1871, c. 62, 16 Stat. 419, read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States included within the limits of the

District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

* * * * *

SEC. 5. *And be it further enacted*, That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. * * *

* * * * *

SEC. 17. *And be it further enacted*, That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual

to the District or to any municipal corporation therein, nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency.

SEC. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act; subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

* * * *

SEC. 20. *And be it further enacted*, That the said legislative assembly shall not have power to pass any ex post facto law; nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax, in any one year, for all general objects, territorial and municipal, than two dollars on every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particu-

lar local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed value of the property of said District, unless authorized by a vote of the people as *hereinafter* [hereinbefore] provided.

3. The pertinent provisions of the District of Columbia Code of 1901 (Act of March 3, 1901, 31 Stat. 1189) read as follows:

SECTION 1. The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provisions of this code.

* * * * *

SEC. 1636. All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the

day of the passage of this act are hereby repealed, except:

First. Acts and parts of acts relating to the rights, powers, duties, or obligations of the United States.

Second. Acts and parts of acts relating to the Court of Claims.

Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

Fourth. Acts and parts of acts relating to the militia.

Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

Sixth. Acts and parts of acts of Congress relating solely to the Departments of the General Government in the District of Columbia, or any of them.

Seventh. Acts or parts of acts authorizing, defining, and prescribing the organization, powers, duties, fees, and emoluments of the register of wills of the District of Columbia and his office.

Eighth. An act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating

the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code.

* * * *

SEC. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of

the principles of equity or admiralty, or of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

4. The Act of the Legislative Assembly of the District of Columbia of June 20, 1872, ch. LI, reads as follows:

Be it enacted by the Legislative Assembly of the District of Columbia, That keepers or owners of restaurants, eating-houses, bar-rooms, or ice-cream saloons, or soda-fountains, at which food, refreshments or drinks are sold, or keepers of barber shops and bathing houses, must put in a conspicuous place in their restaurant, eating-houses, ice-cream saloons, or places for the sale of soda water, a scale of the prices for which the different articles they have for sale will be furnished.

SEC. 2. *And be it further enacted,* That persons violating the provisions of the above section are to be deemed guilty of misdemeanor, and, upon conviction in a court having jurisdiction, are to be fined by the court not less than twenty dollars, and not more than fifty dollars.

SEC. 3. *And be it further enacted,* That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respect-

able well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices, as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture.

The Act of June 26, 1873, ch. XLVI, reads as follows:

Be it enacted by the Legislative Assembly of the District of Columbia, That the proprietor or proprietors, or keeper or keepers, of every licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or establishment in the District of Columbia, shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms of his, her, or their restaurant, eating-house, bar-room, ice-cream saloon, or soda-fountain room, and in one conspicuous place in each small or private

room, if any, used in connection with said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room, for the accommodation of guests, visitors, or customers thereat, printed cards, or papers, on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly sold, or the price or prices for which the articles or things are or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof, and no greater price or prices than those mentioned or contained on said cards or printed papers shall be asked for, demanded, or received from any person or persons for any of the articles or things kept in any manner for sale in any of the places or establishments aforesaid, either by said proprietor or proprietors, keeper or keepers, or by their agents, employes, or any one acting in any manner for them.

SEC. 2. *And be it further enacted*, That on or before the first day of November in each year the proprietor or proprietors, keeper or keepers, of each licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room or establishment in said District, as aforesaid, shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale by him, her, or them, as aforesaid, which shall be filed by the Register in his office, and unless he is notified of changes therein, the copy transmitted and

filed in said office may be used in any case or proceeding under this act as prima facie evidence of the common or usual prices charged for the articles or things mentioned therein by the proprietor or proprietors, keeper or keepers, of any of the places or establishments aforesaid, and in a failure of any proprietor or proprietors, keeper or keepers, to transmit the copy aforesaid, the Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him.

SEC. 3. *And be it further enacted*, That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment: *Provided*, That persons of different sexes shall not be accommodated in the same room or rooms unless they accompany each other, or call for any articles or things together, or unless said room or rooms are ordinarily used indiscriminately by persons of both sexes.

SEC. 4. *And be it further enacted*, That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, shall neglect or refuse to put up printed cards or papers of prices as pro-

vided for in the first section of this act, or shall refuse to send a copy or duplicate to the Register, as provided in the second section, or shall place or cause to be placed on said card or paper, or permit to be placed thereon any price or prices other or greater than that for which any article or thing is, or may be, usually and commonly sold or furnished by him, her, or them, or different from or more than is usually or commonly demanded or received therefor by him, her, or them, or by his, her, or their authority or direction, or shall demand or receive in any manner, or under any circumstances, or for any reason or pretence, in person or by any employe or agent, from any person or persons aforesaid, any sum or prices different or greater than is contained on said cards or papers, or than is usually and commonly asked or received for any article or thing kept for sale as aforesaid, or shall refuse or neglect, in person or by his, her, or their employe or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or

pretext, fail, decline, object, or refuse to treat any person or persons aforesaid, as any other well-behaved and respectable person or persons are treated at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: *Provided*, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

SEC. 5. *And be it further enacted*, That all acts and parts of acts inconsistent herewith are hereby repealed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, *Petitioner,*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent.*

**On Certiorari to the United States Court of Appeals for the
District of Columbia Circuit**

**BRIEF ON BEHALF OF THE WASHINGTON BOARD OF
TRADE AS AMICUS CURIAE**

**E. F. COLLADAY,
General Counsel
WASHINGTON BOARD OF TRADE
*Attorney for
Amicus Curiae***

**D. C. COLLADAY,
*Of Counsel***

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TRADE AS AMICUS CURIAE

JURISDICTION
QUESTIONS PRESENTED
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
STATEMENT OF THE MATTER INVOLVED

As to these matters, this Petitioner concurs with and adopts the presentation thereon set forth in the Brief herein on behalf of the Respondent.

SUMMARY OF ARGUMENT

Petitioner, the Washington Board of Trade, contends (a) that the enactments of the Legislative Assembly of the District of Columbia of 1872 and 1873,¹ which are here in

¹Quoted in Appendix A to Brief herein for the District of Columbia.

question, were beyond the power of that legislative body to enact, being beyond the scope of municipal regulation and not founded upon amendment to the Constitution of the United States which hence was necessary; (b) moreover, that in any event they were repealed by omission in the establishment of a Code of Law for the District of Columbia by the Act of Congress of March 3, 1901, signed by the President of the United States and finally, (c) that, in any event, these enactments were, through non-user for three quarters of a century, repealed by abandonment.

INTEREST OF WASHINGTON BOARD OF TRADE AS AMICUS CURIAE

The Washington Board of Trade is an incorporated non-profit civic association founded in 1889 by Washington businessmen. Its purpose, as expressed in the corporate by-laws, is to consider and act upon matters pertaining to the welfare of the national capital. The Board of Trade's roster of more than 5500 members includes corporations, firms, and individuals representing a comprehensive cross-section of the businesses and professions in the District of Columbia, including among others, banking, retail and wholesale merchandising, service industries, public utilities, newspapers, universities and colleges, and restaurants.

The Board of Trade is concerned in the instant appeal because it raises a question, the determination of which may result in material impairment of the status of the District of Columbia under the Constitution of the United States. Consistently, the Board of Trade has maintained that under the Constitution The Congress cannot delegate its authority to legislate for the District notwithstanding our great desire as citizens of the District of Columbia to have representation in The Congress and participate in the formulation and enactment of the laws under which we live. We want these laws to be created in accordance with the Constitution. For this reason the Board revolts at the use of long-neglected acts of the Legislative Assembly

which existed only from 1871 to 1874 in defining and deciding directly the constitutional status of the District. Until such status has been concretely defined, either by decision of this Court or by amendment of the Constitution, Congress cannot, and will not, grant to the people of the District the privilege of participation in self-government on a national and local level.

The Board of Trade is further opposed to the attempted enforcement of "lost" acts of legislative bodies as repugnant to American standards of fairness. Such practice cannot but impose burdens of unknown magnitude on all Washington business as well as disrupt orderly business planning.

STATEMENT OF THE CASE

On August 1, 1950, the John R. Thompson Co., Inc., a restaurant company, was charged through an information filed by the Corporation Counsel for the District of Columbia with having refused service to certain well-behaved and respectable persons in violation of enactments of 1872 and 1873 of the Legislative Assembly of the District of Columbia regulating restaurants and other eating places in the District. (R. 1-3) The Municipal Court for the District quashed the information, holding that both enactments were repealed by the Organic Act of 1878. The Municipal Court of Appeals for the District affirmed the order of the Municipal Court so far as it related to the enactment of 1872, and reversed the lower court's decision so far as it related to the enactment of 1873 on the ground that said enactment was valid when enacted and was never repealed. Cross-appals were then taken to the United States Court of Appeals for the District of Columbia Circuit. The Chief Judge and three other judges affirmed the decision of the Municipal Court of Appeals with reference to the enactment of 1872 and reversed said court as to the enactment of 1873, holding that said enactment was not within the power of the Legislative Assembly and that both enactments were repealed by

the District of Columbia Code of 1901, the fifth judge being of the view that even if these Acts were within the power of the Assembly to enact, long disuse thereof had repealed them by implication. Certiorari was granted by this Court on April 6, 1953.

I.

THE ENACTMENTS OF 1872 AND 1873 WERE NOT WITHIN THE POWER OF THE LEGISLATIVE ASSEMBLY

The Constitution in Article I, Section 8, Clause 17 empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . ."

The Act of Congress of February 21, 1871 creating the Legislative Assembly for the District of Columbia provided in Section 1:

That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

In Section 5 the Act provided, inter alia:

That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided.

In Section 18 the Act provided:

That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, never-

theless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

The Supreme Court of the United States in the case of *Stoutenburgh v. Hennick*, 129 U. S. 141, decided in January 1889, questioned the power of the Legislative Assembly. The Assembly by an Act of August 23, 1871, amended June 20, 1872, had prohibited "commercial agents" to engage in their business in the District of Columbia without first obtaining a license to do so. An agent of Baltimore, Maryland was convicted in the District of violation of that enactment and sentenced to pay a fine, or in default of payment thereof, to serve a term in the workhouse. In a habeas corpus proceeding he attacked the validity of the enactment on the ground that, as applied to persons soliciting sales of goods in the District on behalf of concerns outside the District, it was a regulation of interstate commerce and hence within the exclusive power of Congress. Chief Justice Fuller, speaking for the Court, said:

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of

Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do. (129 U. S. at page 147).

The Court further said that while it regarded the Act of the Assembly as a purely municipal regulation, it was not such when applied to the defendant because the Act regulated interstate commerce; and was, therefore, void. The concluding language of the Court was as follows:

In our judgment Congress; for the reasons given, could not have delegated the power to enact the 3d clause of the 21st section of the act of assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely (129 U. S. at Page 149).

The Supreme Court in *Metropolitan Railroad v. District of Columbia*, 132 U. S. 1 (1889) held that the District of Columbia was not a sovereign but was a municipal body and that its supreme legislative body was Congress.

In *Roach v. Van Riswick*, MacArthur and Mackey's Reports, 171, (1879), there was presented to the Supreme Court of the District of Columbia, a case involving the validity of an act of the Legislative Assembly of the District of Columbia of August 2, 1871, which provided that judgments rendered in the District shall be a lien on equitable interests in real estate. This legislation had no relation to municipal powers but was of a type of general legislation not customarily delegated by a state legislature to a municipality. The Court held that the Congress could not delegate to the District Legislative Assembly author-

ity to enact such a law. Among other things the Court said at page 172:

There has been an instinctive reluctance on the part of bench and bar, to recognize the legislation of the late government of the District as valid, so far as it transcended the limits of strictly municipal action. This sentiment has hardly shaped itself into a definite opinion, ~~or~~ formulated the reasons for its existence. It has sometimes sought its excuse in the want of positive confirmation by Congress of the legislation in question. This, however, is a very unsatisfactory foundation for it. The organic act, as it is called, i.e., the act of February 21, 1871, which establishes the District government, nowhere contains an intimation that the acts of the new government are to be inoperative until or unless confirmed by Congress; but, on the contrary, by the strongest implication, excludes such idea. The 50th section declares that all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States. Until repealed or modified, the clear implication is that they are to operate, *proprio vigore*. If Congress had first to approve, it is obvious that its judgment as to the rightfulness or expedience of measures submitted to them would be exercised then, and it was unnecessary to reserve it expressly, or the occasion when legislation once in force, is to be reviewed in order to modify or annul it. It is plain to us that as far as Congress could confer the power of original and independent legislation, needing no confirmation, but complete and operative in itself, it has done so by the Act in question. The unwillingness so generally felt to give effect to this legislation grows partly out of a lurking doubt which existed from the beginning and has never been dispelled, as to the constitutional power of Congress to create such an anomalous entity as the late District government, and to invest it with the powers which the act of 1871 purports to convey.

Speaking of the word "exclusive" in article I, section 8, of the Constitution, the Court said:

It may be admitted that the term "exclusive" has reference to the States and simply imports their exclu-

sion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to that of Congress and created by it.

The Court went on to hold that under the general principles, Congress had no right to delegate to the District Assembly power to legislate over anything but local municipal affairs:

Our conclusion, on the whole, is, that the act of the District legislature declaring judgments rendered by this court to be liens on equitable interests in land, was an act of legislation which it was only competent for the Congress of the United States to pass, and was in itself totally inoperative and void, and the decree rendered by the Court below must be reversed. (MacArthur and Mackey's Reports at page 187)

In *Cooper v. The District of Columbia*, 11 District of Columbia Reports (MacArthur and Mackey) 250, decided May 18, 1880, the Court considered an ordinance of the Legislative Assembly of the District passed August 23, 1871, providing for the licensing of produce dealers within the limits of the District. The Court sustained the Act of the Legislative Assembly on the ground that the licensing of produce dealers was a municipal matter in respect of which Congress had power to delegate legislative authority to the District government, and the Court distinguished the decision in *Roach v. Van Renswick* on that ground.

In *Smith v. Olcott*, 19 App. D. C. 61 (1901), the Court of Appeals of the District of Columbia held invalid so much of section 21 of an act of the Legislative Assembly of the District of August 23, 1871, as fixed the rate of charges by auctioneers for selling real estate on the ground of its being an attempt to exercise a general legislative power over the freedom of contracts, which it was not within the power of Congress to delegate. The Court said:

Congress has express power 'to exercise exclusive legislation in all cases whatsoever,' over the District of Co-

lumbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes,' could only authorize it to exercise municipal powers.

The Court also said:

It is not a mere local regulation within the scope of the powers ordinarily delegated to municipal corporations, but an attempt at the exercise of a general legislative power over the freedom of contracts.

It is essentially different from the power exercised in other parts of the Act in the matter of regulating the occupation of auctioneers, and laying a license tax upon the same.

It also differs from those enactments, frequently made by municipal bodies under special delegations of power, which regulate the charges, by fixing a maximum rate, of all persons engaged in certain particular callings, as for example, hackmen, who make special use of the public streets and places in the pursuit of their regular calling.

It will be observed that the regulation in question does not undertake to fix a maximum rate of charges for auctioneers, leaving parties free to contract for less if they see proper, but undertakes to prescribe one absolute, invariable charge for all sales of real estate. In this respect it resembles an act prescribing the fees of public officers, for official services compulsorily rendered, and which, as a matter of sound public policy, are not permitted to become the subject of special contract. (19 App. D.C. at page 75)

Another decision by the Court of Appeals of the District of Columbia which is pertinent was rendered in the case of *Coughlin v. District of Columbia*, 25 App. D. C. 251 (1905). Congress had passed a joint Resolution on February 26, 1892, 27 Stat. 394, empowering the Commissioners of the

District "to make and enforce all such reasonable and usual police regulations in addition to those already made under the Act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the District of Columbia * * *." Pursuant to that Resolution the Commissioners passed and promulgated a regulation requiring the owners or occupants of buildings or land fronting upon a paved sidewalk in the District to remove snow and ice therefrom. The Court said:

... it is regulation, not legislation, that is authorized; the reasonable regulation of the exercise of right, not the imposition of a duty; the usual police regulation for the maintenance of public order, not the levying of a tax either in the way of enforced labor or in the way of purchase of materials for sprinkling the sidewalks. Whatever power the legislature itself may have in the premises, certainly it is not to be presumed to have granted such plenary authority as is here claimed under the joint resolution of 1892.

That various municipalities may have exercised such power, as appears from various municipal ordinances collated in the brief on behalf of the appellee, is not to the point. Municipalities are usually vested with quasi legislative powers, among them the sovereign power of taxation and assessment, and from the fact that municipal ordinances are elsewhere to be found, analogous to the so-called regulation here in question, it is not to be inferred that similar powers exist in the commissioners of the District of Columbia. The commissioners are not the municipality, but only the executive organs of it; and Congress has reserved to itself, not only the power of legislation in the strict sense of the term, which it cannot constitutionally delegate to anyone or to any body of men; but even the power of enacting municipal ordinances, such as are within the ordinary scope of the authority of incorporated municipalities. It has delegated to the commissioners simply the power of making "police regulations," and only

such police regulations as are usual and commonly known by that designation. (25 App. D. C. at pages 254-255)

The Court held the regulation invalid and rested its decision in part upon the ground that the Congress on three occasions had expressly legislated on the same subject. The Court said those Acts by Congress were sufficient to show that it had reserved this subject for itself and did not confer upon the Commissioners the power to regulate it.

The regulation was stated to be copied from an old municipal ordinance of the City of Washington and the Court said:

... Instead of an application to Congress there has been this ill-advised resurrection of an old municipal ordinance, and the promulgation of it by the commissioners as a regulation of their own, intended to effect what three several acts of Congress had failed to effect. We cannot but regard it as a plain usurpation of the powers of Congress. (25 App. D. C. at page 257)

In *United States ex rel. Daly v. MacFarland*, 28 App. D. C. 552 (1907), it appeared that under an Act of April 23, 1892, 27 Stat. 21, and an Act of March 3, 1893, 27 Stat. 537, the Congress had extended to the Commissioners of the District power to make plumbing regulations, and had provided that violation of such regulations should be punishable by fine or, in default of payment thereof, by imprisonment. The Commissioners promulgated regulations, but included therein an additional penalty for violation, to wit, the revocation of a plumber's license. Acting under the regulations thus promulgated, the Commissioners forfeited a license. In a mandamus proceeding to compel restoration of the same, this court held that it was not within the power of the Commissioners to provide the additional penalty. The court said:

It is well settled that the District of Columbia has no legislative power, it being merely a municipal corpora-

tion bearing the same relation to Congress that a city does to the legislature of the State in which it is incorporated. (Citing authorities)

The next proposition is equally established, namely, that '*a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.*' Dill. Mun. Corp. 4th ed. Sec. 89.¹

* * * *

... The constitutional guaranties of the liberty and property of the individual undoubtedly include and protect him in the exercise of his right to earn his living by following a lawful calling, and this right is subject only to reasonable control. That such a license as was revoked in this case is a species of property goes without saying. The right to forfeit this property by the revocation of the license must clearly appear, or it must be held not to exist. Judge Dillon says (sec. 345):

'A corporation, under a general power to make by-laws, cannot make a by-law ordaining a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly* conferred by the legislature.'

Certainly such power will not be presumed to exist in statutes in restraint of the ordinary and legitimate avocations of life, avocations in which the mass of human toilers gain their livelihood and contribute to

¹ Judge Dillon in support of the text cites numerous cases. To these may be added: *Greater New York Athletic Club v. Wurster*, 19 Misc. 443, 43 N. Y. Supp. 705; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720; *Coughlin v. District of Columbia*, 25 App. D. C. 251. See also 21 Am. & Eng. Enc. Law, 2d ed. p. 948.

the welfare and happiness of society. In *Greater New York Athletic Club v. Wurster, supra*, the court held that a grant of power to abridge and curtail the exercise of the right of the individual to engage in or pursue a business or calling lawful in itself can only be justified and sustained on the theory that the exercise of such power is necessary to the public welfare and safety, and such power cannot be presumed, but must be clearly expressed. (28 App. D. C. at pages 558-562)

Johnson v. District of Columbia, 30 Appeals D. C. 520 (1908), was a decision by the Court of Appeals of the District of Columbia in which it held that an act of the Legislative Assembly of August 23, 1871, which prescribed a jail penalty or fine or both for cruelty to animals was a mere police regulation. The Court said:

We think it clear that the two sections of the Act above referred to . . . are mere police regulation, and therefore within the scope of powers delegated to the municipality by Congress. *Stoutenburgh v. Hennick*, 129 U.S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Smith v. Olcott*, 19 App. D. C. 61. Cruel treatment of helpless animals at once arouses the sympathy and indignation of every person possessed of human instincts,—sympathy for the helpless creature abused, and indignation towards the perpetrator of the act; and in a city, where such treatment would be witnessed by many, legislation like that in question is in the interest of peace and order and conduces to the morals and general welfare of the community. 'Laws for the prevention of cruelty to animals may well be regarded as an exercise of such police powers. That good government calls for the condemnation of such acts as are prohibited by the ordinance ought not to be questioned. The subject is pre-eminently one for local municipal regulation.' *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S.W. 791. (30 App. D. C. at page 522)

In the foregoing pages we have reviewed the important Court decisions dealing with or bearing upon the question

of what enactments of the Legislative Assembly of the District of Columbia created by Congress in the Act of 1871 are properly classed as legislation, and therefore beyond the power of Congress to delegate to the Assembly. From our examination of them, we consider it clear that the Acts of the Assembly of 1872 and 1873 involved in the case at bar are attempts to legislate, and therefore unconstitutional and void.

In the matter of legislation for the District of Columbia Article 1, Section 8, Clause 17 of the Constitution is to be taken literally. Its language is "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. That language cannot be tortured into anything else. The only way to empower a Legislative Body in and for the District of Columbia to enact general legislation is to amend the Constitution and provide clearly therefor.

As Senator Johnston of South Carolina said in debate on a so-called "Home Rule" Bill in the Senate on January 15, 1952:

The distinction recognized and running through all these cases, though not clearly or specifically defined, yet applied in each case, is very specific, namely, that the Congress may not delegate its exclusive right of legislation and that it can only delegate such power as a State legislature delegates it to municipal corporations to enact strictly local municipal regulations or city ordinances. The dividing line is always left open for judicial construction and final determination of what may be general legislation and what may be a local regulation. (Congressional Record, Daily Edition of January 15, 1952, p. 184, column 3)

The Senator, before making the above quoted statement, had read to the Senate the pertinent parts of many of the decisions which we have reviewed in the preceding pages of this Brief.

We agree with the Senator.

The enactments of the Assembly of 1872 and 1873 were not municipal ordinances—they were general legislation.

They undertook to say what kind of sale a citizen could make of his property, that is to whom he could sell it, and prescribe a fine and forfeiture of his license if he refused to sell to a person of a certain class specified in the enactments. Thus, they limited the use of his property in the exercise of his lawful business. That is not a municipal ordinance. The citizen restaurant proprietor, before these enactments, was free as had been all restaurant owners from the time such establishments were first set up in this country and in Europe to choose his customers and withhold his goods (food, drink, and service) from any person with whom he did not choose to deal. He was free to contract or not to contract. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773 (1944); *Beale Innkeepers and Hotels*, 1906, §§ 15, 35, 53, 61, 301; *Williston, Contracts* (Rev. Ed. v. 4, § 1066, pp. 2964, 2965); 43 C. J. S. Innkeepers, § 2, p. 1136.

These enactments undertook to take away from him that right of freedom of contract and to brand him as a violator of the law if he did not comply therewith. That is not a municipal ordinance or a police regulation. It is not within the description of the proper subject matter of a municipal ordinance, as stated by McQuillin:

... to the promotion or protection of the public morals and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health which are the ordinary subjects of municipal regulation. (*Municipal Corporations*, 3rd ed., v. 7 § 24.198, p. 15.)

The enactments of 1872 and 1873 are legislation, as shown in the decisions of the Courts which have considered these enactments, namely, the Supreme Court of the United States, the Supreme Court of the District of Columbia sitting in General Term, and the Court of Appeals of the Dis-

trict of Columbia. And now, in the instant case, the same view is taken by the Municipal Court of the District of Columbia and affirmed by the United States Court of Appeals for the District of Columbia Circuit.

The Attorney General (Brf. p. 26) and the Corporation Counsel (Brf. Sec. 1) have attempted to uphold the power of Congress to delegate to the Legislative Assembly of the District of Columbia authority to enact general legislation by classing the District of Columbia with the Federal Territories and applying to both alike the decisions of this Court, which sustain the power of Congress to delegate such authority to the Territorial Legislatures. The provisions of the Constitution do not justify this contention.

The power of Congress over the District of Columbia is in Article I, Section 8, Clause 17 of the Constitution. The power of Congress over the Territories is not derived from that source. It is contained in Article IV, Section 3, Paragraph 2, which reads as follows:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

It seems appropriate here to take cognizance of some expressions on this subject made in the Congress itself.

Senator Johnston in the debate on the so-called Home Rule Bill, January 14, 1952, drew the distinction plainly. After quoting the above provision as to the Territories, he said:

It has been argued * * * that our power to legislate for the District of Columbia is similar to the power we possess with respect to our Territories. However, that argument is fallacious, and the contentions in support of it are groundless. Why? The powers we possess are derived from different clauses of the Con-

stitution and from different language employed in that instrument. * * *

No such general power in language so specific is contained in the constitutional authority of Congress for the passage of legislation for the District, because that power is "exclusive." Exclusive to whom? Exclusive to the Congress. * * * I hold that the Congress has no power to delegate this constitutional function to a council in the District of Columbia, regardless of the way that council may be chosen. The District of Columbia Committee of the Senate and the District of Columbia Committee of the House of Representatives, or either of them, could not be invested with power by the Congress to sit alone as a local legislature for the District of Columbia. I can more easily reach the conclusion that such a position is justified than I can come to the conclusion that the Congress has the power to divest itself of its constitutional function, however tedious, however—some may say—"burdensome," however trivial the consequences of such a so-called burden may be. (Congressional Record, Daily edition of January 14, 1952, page 133, columns 1 and 2)

On this subject it is clear that the constitutional powers of Congress with respect to the Territories and those with respect to the District of Columbia are entirely separate and distinct, and decisions and arguments sustaining the power of Congress to delegate the power of legislation in the Territories to the Legislatures of the same have no bearing upon the question of the power of Congress to delegate to a Municipal Council or Assembly in the District of Columbia authority to enact general legislation for the District.

II.

THE ENACTMENTS OF THE LEGISLATIVE ASSEMBLY OF 1872 AND 1873, BEING OF THE CHARACTER OF GENERAL LEGISLATION, WERE REPEALED BY THE DISTRICT OF COLUMBIA CODE OF 1901, ACT OF MARCH 3, 1901, 31 STAT. 1189.

Section 1 of the Code of 1901 provided that:

The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

There was no specific reference in that section to the enactments of the Legislative Assembly, but Section 1636 of the Code provided:

All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except: * * *

Of eight exceptions only the third and fifth are pertinent here. The third exception designated:

Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

The enactments of 1872 and 1873 were not saved by that exception, because they were not in the nature of police regulations and did not relate solely to municipal affairs; nor are they saved by the other provisions of this third exception.

The fifth exception only saved from repeal:

All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

In the light of the many Court decisions which we have quoted under Point 1 of this Brief, we believe it is clear that the Acts of the Assembly of 1872 and 1873 were not police regulations but were intended by the Assembly to be legislation; neither were they "Acts relating to municipal affairs only".

The Acts of the Assembly of 1872 and 1873 provided that upon conviction of the offenses defined therein a restaurant keeper shall be fined \$100.00 *and forfeit his, her or their license*. These provisions for forfeiture of the restaurant keeper's license are not remedial, but are clearly in the nature of a penalty and it follows that the enactments were not saved by the fifth exception, which saved only "all penal statutes authorizing punishment *by fine only or by imprisonment not exceeding one year or both.*"

Chief Judge Stephens, in Part II of his opinion, after reviewing the hereinabove quoted provisions of the District of Columbia Code of 1901, in which he reached the conclusion that the enactments of the Legislative Assembly of 1872 and 1873 were repealed by that Code, closed his discussion of the point in the following language:

We think it clear that the license forfeiture provisions of the enactments of 1872 and 1873 are in the nature of penalties. The 1872 enactment makes violation a misdemeanor; the 1873 enactment provides for enforcement by information filed in the Police Court of the District of Columbia, subject to appeal to the Criminal Court of the District in the same manner as provided for the enforcement "of the District fines and penalties

under ordinances and law." The license forfeiture provisions are an integral part of those sanctions. (R. 27-28)

Judge Prettyman joined with Judge Stephens on this point, and added, with reference to the enactments of the Assembly of 1872 and 1873, they "in any event were repealed by the 1901 Code."

The conclusions thus arrived at by Chief Judge Stephens and the three associate Judges concurring therein, and by Judge Prettyman, are so clearly correct, in our opinion, that no further discussion of the same by counsel submitting this brief is deemed necessary in this title.

III.

THE ENACTMENTS OF 1872 AND 1873 WERE ABANDONED AND BY NON-USER WERE REPEALED.

An agreed statement of facts was filed in the Municipal Court containing the following:

There is no official record of any attempted prosecutions for violations of the terms of the Legislative Assembly Act of June 20, 1872; that upon information and belief there were four such prosecutions, all resulting in convictions in the Police Court but all being reversed in the Supreme Court of the District of Columbia, holding criminal court, or resulted in nolle pross; that all four such prosecutions were in the year 1872 and that there have been no further attempted prosecutions under the 1872 Act since that year.

That there is no official record of any attempted prosecutions under the terms of the Legislative Act of June 26, 1873, and, so far as can be learned, there was never an attempt of prosecution under that Act. (R. 18)

The 1873 enactment required the filing with the "Register of said District" of "a printed copy of the usual or common price or prices of articles or things kept for sale by him . . . which shall be filed by the Register . . . and in a failure of any proprietor . . . to transmit the copy aforesaid, the

said Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him." The "agreed statement of facts" contained the following:

That the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the Assessor (sic) of the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale, as required by the Act of June 26, 1873, and, so far as is known, no demands were ever made upon local restaurants so to file by the Assessor (sic) or other municipal officer. (R. 18)

The four Judges who united in the first or principal opinion of the Court below, considered these agreed facts and the contention of the Thompson Company that the failure of the Municipal authorities to enforce the Assembly Enactments of 1872 and 1873 constitutes an administrative interpretation that the enactments were not in force and effect and had been repealed by this "long course of administrative interpretation or by obsolescence", and said that the enactments having lain unenforced for 78 years the decision of the municipal authorities to enforce them now was in effect a decision legislative in character, which were better left to the Congress. They then reasserted their conclusions and the concurring conclusion of Judge Prettyman and announced the judgment of the Court in the following language: . . .

In accordance with the conclusions we reach that the enactments in question in the instant case were not within the power of the Legislative Assembly and that they were repealed, and in view of Circuit Judge Prettyman's view expressed in his separate opinion that if the enactments were general legislation they were invalid when enacted and were repealed, that if they were municipal ordinances regulatory of licensed businesses they are now unenforceable:

The Judgment of the Municipal Court of Appeals as to the first count of the information is affirmed.

and as to the second, third and fourth counts of the information is reversed. (R. 88; 89)

Judge Prettyman first stated that if the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond the power permitted a municipal body in the District of Columbia by the Constitution; and furthermore, even if valid when enacted, they were repealed by the 1901 Code.

He then addressed himself to the view of the four dissenting Judges, holding that the enactments are regulatory municipal ordinances. He said, in effect, that considering the enactments in this light they are not statutes but are merely regulatory ordinances; acts of an official body having power to repeal or abandon them, and on this point of abandonment said:

It seems to me that a regulatory condition imposed upon a business license, originally prescribed by a municipal licensing authority in 1872 and 1873 but neither mentioned again nor enforced for a period of 75 years, despite the interim promulgation of apparently complete regulations and the issuance of thousands of licenses during that period, must be deemed by the courts to have been abandoned by the licensing authority.

No prosecution under these enactments has been attempted since 1872. No mention of them has been made by any official since 1873: * * * Congress has passed licensing acts several times since 1873, general acts in 1902¹ and 1932², and an Act giving the Commissioners power to prescribe regulations for the sale of alcoholic beverages, an important part of many restaurant businesses, under licenses.³ The latter con-

¹ Act of July 1, 1902, 32 STAT. 622; as to "victualers . . . or eating houses, by whatsoever name designated," see 32 STAT. 625, D. C. CODE § 20-887 (1929).

² Act of July 1, 1932, 47 STAT. 550; as to restaurants see 47 STAT. 554, D. C. CODE § 47-2327 (1940); as to regulations see 47 STAT. 563, D. C. CODE § 47-2345 (1940).

³ Act of Jan. 24, 1934, 48 STAT. 322, D. C. CODE § 25-107 (1940).

tained many regulatory provisions and authorized the Commissioners to prescribe others. The enactments of 1872 and 1873 applied to barrooms as well as to restaurants. Extended regulations for the operation of restaurants have been promulgated at least once by the Commissioners; in 1942 the Commissioners published an order which began: "That for the purpose of regulating the establishment, maintenance and operation of restaurants, delicatessens and catering establishments in the District of Columbia, the following regulations are hereby adopted: . . ." In none of the statutes or regulations adopted since 1873 have the regulations with which we are here concerned been mentioned or referred to . . . (R. 90, 91)

Judge Prettyman further said:

Since 1878 the Board of Commissioners has been the governing body of the District of Columbia,⁴ which is a municipal corporation.⁵ They have had the power both to make⁶ and to enforce⁷ municipal regulations and generally to exercise all the usual powers of a municipal corporation.⁸ Theirs have been the powers of local ordinance-making and of law enforcement.⁹ They could repeal what they could enact. Thus the failure to restate and to enforce the 1872-73 conditions was by an official body which had power to do just that. Executive disuse of a legislative enactment is not involved. What is involved is disuse by a licensing authority of its own regulations. (R. 92)

⁴ 20 STAT. 103 (1878), as amended, D. C. CODE § 1-201 (1951).

⁵ REV. STAT. D. C. § 2 (1874), 18 STAT. part 2, § 2, D. C. CODE § 1-102 (1951).

⁶ 27 STAT. 394 (1892), D. C. CODE § 1-226 (1951). Since 1902 they have had specific power to require licenses for businesses or callings. 32 STAT. 622 (1902), as amended, D. C. CODE § 47-2344 (1951).

⁷ REV. STAT. D. C. § 3 (1874), 18 STAT. part 2, § 3, 18 STAT. 116 (1874), 20 STAT. 103 (1878), D. C. CODE § 1-218 (1951).

⁸ *Supra*, note 5.

⁹ *Railroad Co. v. District of Columbia*, 10 App. D. C. 111, 125 (1897).

We agree with Judge Prettyman that 75 years of disuse of a licensing regulation by the licensing authorities of the District of Columbia amounts to abandonment of the same and, if the Court should conclude that the enactments of the Assembly of 1872 and 1873 were mere licensing regulations, then clearly they have been abandoned and repealed by the licensing authority, namely, the Board of Commissioners of the District of Columbia.

Judge Prettyman was quite familiar with the police regulations and licensing laws of the District of Columbia, their origin, nature, application and the process of enforcement thereof, having been Corporation Counsel of the District of Columbia from 1934 to 1936 and in charge of enforcing all such regulations.

When the Commissioners published their Order of 1942¹⁰ regulating the maintenance and operation of restaurants in the District of Columbia, as cited by Judge Prettyman, their failure to mention the provisions of the enactments of 1872 and 1873 constituted, we believe, repeal of those enactments by implication. They presumably were aware, in their official capacity, of the existence of the earlier regulatory provisions. Failure of the Commissioners expressly to include them, or their equivalent, in the new regulations necessarily indicates a conscious intention to eliminate them.

Judge Prettyman continued and considered whether the enactments in question were legislation and said:

The only question presented by the present case within the scope of judicial power is the simple question whether these 1872-73 enactments of the Legislative Assembly are presently enforceable against this appellant in a criminal proceeding with its mandatory license forfeiture upon conviction. (R. 97)

He recited various police regulations and municipal ordinances passed by the District Commissioners and

¹⁰ Officially published in Washington Times Herald, April 2, 1942

pointed out that those were regulations which did not impose conditions upon a license but were police regulations imposed upon everybody and that no forfeiture of license is a prescribed penalty for their violation and then concluded:

But a regulation imposed upon a designated business which is operated under a license, and upon such a business only, for violation of which regulation forfeiture of the license is decreed, is a condition upon operation under the license; call it what we will. (R. 98)

Judge Prettyman concluded in the following language:

I concur in the judgment announced by Chief Judge Stephens. But I think it unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances. The same ultimate result—that they are presently unenforceable—follows in either event. If they were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority which originally adopted them. (R. 99)

We believe, and urge the Court to find, that the enactments of the Legislative Assembly of 1872 and 1873 in question here were attempts at general legislation which only Congress could enact and had the power to enact, and which power it could not delegate to such a municipal legislative body as the Assembly, or that they were municipal licensing regulations, and were repealed by the District of Columbia Code of 1901; or that they were abandoned and by non-user were repealed.

The history of issuance of business licenses, including those for restaurants, throughout 75 or more years, reflects clearly the community disuse by common consent, both official and popular, of the principles embodied in this prosecution.

The now sudden and unexpected enforcement of such regulations upon the business community of the Nation's Capital bids fair to disrupt a substantial segment of the economic community which is the operating substance of the City of Washington.

When the license to the restaurant involved in this case was issued to it, the words contained in the license and the language in the license laws embodied in the District of Columbia Code and in the regulations pursuant thereto, promulgated by the Commissioners of the District of Columbia carried no reference, either specific or by implication, to any previously existing license conditions enacted three-fourths of a century before by a Municipal Assembly, which ceased to exist three years after its birth. To import them into that license now is not consistent with our Constitutional system of government.

This cause presents a question as to whether an enactment of a "Legislative Assembly," brought about by conditions existing in a loosely organized, incompetent municipality which came into discredit almost immediately after it was created, and was ended by Congress, its creator, as soon as its unsatisfactory nature and operations definitely developed, can now, three-fourths of a century later, be resurrected and attached purely by implication to an ordinary business license.

CONCLUSION

To summarize, the real issue before the Court in this case is whether the dead hand of long ago, is now, more than 75 years later, to be revitalized and laid upon an economy of a modern metropolitan community of international proportions and importance.

The so-called legislation, the center of this controversy, is shown herein to have been beyond the power of the Legislative Assembly which purported to create it, whether through authority to adopt general legislation or to exe-

cute powers of local municipal regulation. Indeed, it has been demonstrated that the enactments in question could not, and such enactments cannot now, be legalized without specific amendment to the Constitution.

Moreover, as we have shown, even if the foregoing views be considered untenable, we have demonstrated that the enactments in question were repealed by omission when the Congress enacted and the President signed the Act of March 3, 1901, creating a Code of Law for the District of Columbia, without saving exceptions as to them. Finally, even if the Court should brush aside all of these tangible elements, it remains inescapable that the enactments of 1872 and 1873 were, through non-user for 75 years, abandoned and thereby repealed.

Convincing and concrete evidence of such abandonment and continuance thereof, is presented in the order of 1942 issued by the Commissioners of the District of Columbia to regulate the establishment, maintenance and operation of restaurants, wherein the aforementioned enactments of 1872 and 1873 were in nowise referred to, even by implication.

Reimposition now by judicial fiat of this long-dead regulatory legislation, whether through the means sought herein or otherwise, without due legislative process would, we respectfully submit, constitute an unwarranted blow to the business community of the Nation's Capital.

Respectfully submitted,

E. F. COLLADAY,
General Counsel
WASHINGTON BOARD OF TRADE
Attorney for
Amicus Curiae

D. C. COLLADAY,
Of Counsel